THE

Madras Weekly Notes

CRIMINAL — 1946

REPORTS

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PRIVY COUNCIL
(Appeal from the Supreme Court of Palestine)
May 18, 1944

Adel Muhammed El Dabbah
v.
The Attorney-General of Palestine

VISCOUNT MAUGHAM, LORD THANKERTON & SIR MADHAVAN NAIR

Criminal Trial—Evidence Witnesses for prosecution not examined—Tendering for cross-examination—Matter of discretion for the prosecutor.

There is no obligation on the prosecution to tender witnesses whose names were on the information but were not called to give evidence for the prosecution for cross-examination. The prosecutor has a discretion as to what witnesses should be called for the prosecution and the Court will not interfree with the exercise of that discretion unless perhaps it can be shown that the prosecutor has been influenced by some oblique motive.

It should be a general practice of prosecuting counsel if they find no sufficient reason to the contrary to tender such witnesses for cross-examination by the defence.

Gilbert Beyfus & John Basset, for Applt.

Solicitor General & Knelem Preedy, for Respt.

JUDGMENT.

LORD THANKERTON: On the 24th March, 1943, the Chief Justice of Palestine, sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder contrary to section 214 (b) of the Criminal Code Ordinance, 1936, and sentenced him to death. An appeal by the appellant was dismissed on the 17th April, 1943, by the Supreme Court of Palestine sitting as the Court of Criminal Appeal and the appellant, by special leave, now appeals against that judgment.

Mr. Beyfus, in his full and able argument on behalf of the appellant, conveniently submitted his contentions under two heads, viz., those which challenged the constitution of the Court of Criminal Assize by which the appellant was tried, and those which alleged grave impropriety in the course of the trial.

As regards the constitution of the trial court, the Chief Justice sat alone by virtue of Regulation No. 4 of the Palestine Defence (Judicial) Regulations (No. 2), 1942, which provided as follows:

"3. Whenever the Chief Justice considers it expedient so to do he may, either generally or for the hearing of any particular case, direct that the Court of Criminal Assize shall consist of the Chief Justice or a British puisne judge, sitting alone or with any one or more judge or judges of the Supreme Court, or with a president or relieving president or any one or more Palestinian judge or judges, of the District Court."

At the date of making these regulations, the constitution of the Court of Criminal Assize was prescribed by Section 10 of the Courts Ordinance, 1940 (No 31 of 1940), under which, in the absence of any application by the accused, such Court must consist of three judges. No such application was made by the present appellant.

Mr. Beyfus submitted that the Court of Criminal Assize was not validly constituted on three grounds, viz., (a) that Regulation No. 3 already referred to, which was made by the High Commissioner under the powers vested in him by Article 3 of the Emergency Powers (Colonial Defence) Order in Council, 1939, and the Emergency Powers (Defence) Act, 1939, was not within the powers thus vested in him, and was therefore *ultra vires* of the High Commissioner; (b) that, assuming that Regulation No. 3 was *intra vires* of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case; and (c) that, in any event, such a direction was an order within the meaning of section 7 of the Palestine Interpretation Ordinance, 1933 (No. 69 of 1933), which was applied to the Defence (Judicial) Regulations, 1942, by Regulation No. 9 thereof, and which required publication in the Gazette before such an order could have the force of law. These

submissions were raised for the first time before this Board.

(a) It is unnecessary to refer to the Order in Council of 1939 in detail; it is sufficient to state that its effect was to extend the Emergency Powers (Defence) Act, 1939, to Palestine and, for present purposes, that the parts of section 1 of the Act which are material may be read as originally enacted, with the substitution of the High Commissioner for His Majesty in Council.

The material parts of section 1 are as follows:—

"1.—(1) Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as 'Defence Regulations') as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."

(2)..................

"(3) Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and bye laws for any of the purposes for which such Regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purpose of the Regulations.

"(4) A Defence Regulation, and any order, rule or bye law duly made in pursuance of such a Regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

Counsel maintained that the discretion conferred on the Chief Justice by Regulation No. 3 involved a delegation of his powers by the High Commissioner which was not authorised by sub-section 3 of section 1 of the Act of 1939, which only authorised a delegation in general terms of the High Commissioner's power to make regulations under sub-sections (1) and (2) of section 1, and that, therefore, the attempted delegation in Regulation No. 3 was *ultra vires* of the High Commissioner. Counsel also maintained that the right conferred on an accused to be tried by a court of three by the Courts Ordinance of 1940 could not be modified or abrogated by any such regulation made by the High Commissioner, and that, in any event, the intention to modify or abrogate such a right must be made clear beyond any doubt in the regulations.

Their Lordships are unable to accept any of these contentions. In their opinion, it is clear that the High Commissioner satisfied himself that these regulations were necessary or expedient for the purposes stated in sub-section (1) of the Act of 1939 and *inter alia*, that a flexibility in the constitution of the courts of criminal assize was necessary or expedient. It was rightly admitted by counsel for the appellant that he was not able to challenge the validity of the High Commissioner's conclusions. Their Lordships are of opinion that the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers, but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions. Accordingly, no question can arise under sub-section (3) of section 1 of the Act. As regards the other contentions as to modification or abrogation of the appellant's right to a court of three under the Courts Ordinance of 1940 regulation No. 3 of 1942 is clearly inconsistent with it, and, by virtue of sub-section (4) of section 1 of Act, the Regulation must prevail. The suggestion made by counsel that the appellant's right was not modified or affected until the Chief Justice exercised his discretion is fallacious; it was modified by the regulation as soon as it came into operation.

(b) Regulation No. 3 of 1942 makes no provision for the form which the direction by the Chief Justice is to take. In the present case the constitution of the Court which was to try the appellant was prescribed in the Cause List of the Supreme Court of Palestine for the week ending Saturday, 20th March, 1943, which had been approved by the Chief Justice prior to Monday, 15th March, 1943. Their Lordships can see no ground for suggesting that this course for fixing the constitution of the Court which was to try the appellant, and which is obviously the usual method of administering the business of the Court, was not a proper method by which the Chief Justice should exercise the discretion vested in him.

(c) Section 7 of the Interpretation Ordinance, 1933, so far as material, provides as follows:—

"7. Where an Ordinance confers power on any authority to make regulations or orders, the following provisions shall have effect with reference to the making and operation of such regulations or orders:

(d) all regulations and orders, save where otherwise provided, shall be published in the Gazette and shall have the force of law upon such publication thereof or from the date named therein."

It follows from the views already expressed by their Lordships that the direction by the

Chief Justice under Regulation No. 3 of 1942 is not a regulation or order within the meaning of the above section, and that there was no need to publish it in the Gazette.

Their Lordships now turn to the second group of contentions raised on behalf of the appellant, which relate to the course of the trial, and are as follows:—(a) That the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him; (b) that there was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of sections 214 and 216 of the Palestine Criminal Code Ordinance, 1936, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon: and (c) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender for cross-examination by the defence witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

(a) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on the 17th April 1943, which the learned Judge now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon, is admitted by the learned Judge in his statement, viz. the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his deposition at the preliminary enquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villages but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the learned Judge.

(b) The appellant was charged under section 214 (b) of the Criminal Code Ordinance as having "with premeditation" caused the death of the deceased, and section 216 provides as follows:—

"216 For the purpose of s. 214 of this Code a person is deemed to have killed another person with premeditation when—

(a) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and

(b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions, and

(c) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if, any, with which such person was killed."

In order to prove premeditation it shall not be necessary to show that an accused person was in any state of mind for any particular period or within any particular period before the actual commission of the crime, or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime". Under this section the three essential ingredients are cumulative, and while Mr. Beyfus admitted that there was sufficient evidence to justify a finding under (b) and (c) he submitted that there was no sufficient evidence to justify a finding under (a), and that, subject to his next contention, the learned Judge misdirected himself, and the conviction under section 214 could not be supported. It will seldom be found that there is direct evidence of a resolution to kill; such resolution will more often rest on legitimate inferences from the proved circumstances and the conduct of the accused, and, in the opinion of their Lordships, the circumstances proved in the present case and the conduct of the accused, along with the two others who accompanied him, but whose identity has not been proved, afford ample ground for a finding that the appellant resolved to kill the deceased.

The Court of Criminal Appeal, holding, in effect, that the Chief Justice had pronounced no finding as to premeditation, and forming an independent view of their own upon the

evidence, stated, "it is quite clear to our minds that the irresistible inference—the only inference possible from the facts of this case is that this killing was done with premeditation." While not accepting their criticism upon the judgment of the Chief Justice, their Lordships are unable to come to any different conclusion upon the facts, which are summarised by the Court of Criminal Appeal as follows:—"That the three armed men were seen proceeding from north to south at varying distances up to a maximum of a hundred metres from the house of the deceased; that shots were fired by those armed men into the doorway of the house of the deceased; that the deceased was found lying eighteen metres from his doorway with two shots in the back that the three armed men were seen immediately after the shots had been heard proceeding together from south to north over the road by which they had approached the scene; that there is no evidence and no suggestion that there was any provocation or quarrel; and that it was night time". On the question of common design, they state, "Three men armed going to the scene of the crime, all returning from the scene together, all three actually shooting into the doorway of the house of the man who was eventually killed, two cartridges found showing that two shots had been fired two and a half and four metres from the place where the body of the deceased was found. From these facts it seems to this Court that common design is proved beyond a shadow of a doubt, and that no other conclusion is possible." It is also well to bear in mind the conclusions of the Court of Criminal Appeal as to proof of enmity between the appellant and the deceased and between their families, which have been already referred to. This evidence of enmity was also treated by the learned Chief Justice as relevant to the question of premeditation. It may be added that the appellant himself admitted that there were broken relations between the deceased and himself.

The appellant's counsel submitted that, in any event, the Chief Justice had neither considered, nor made any finding on, premeditation, and the Court of Criminal Appeal would appear to have accepted this criticism to some extent. In their Lordships' opinion, the learned Judges did not pay sufficient attention to the clear and express language of the Chief Justice. The form of his judgment was provided for by section 51 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, which provides:—

"51. Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceeding, record the findings of fact on which the conviction is based:

Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case."

It is only necessary to make a short quotation from the judgment of the learned Chief Justice.

"It is not necessary for the prosecution to prove a motive for a murder, but it does explain what otherwise might be unexplainable. In this case it explains the shooting in cold blood of the deceased, and it was a premeditated murder.

I therefore find that Adel, accused No. 1, was one of the three men who took part in this murder, and I therefore find him guilty of murder as charged . . . . Adel Muhammad Dabbah, as I said a few moments ago, this is a cold-blooded premeditated murder, of which I find you guilty."

The Court of Criminal Appeal does not pay attention to these findings as to premeditation, which expressly formed part of the charge and one could not easily assume—even apart from his express reference thereto—that the learned Chief Justice had not considered this outstanding element in the law of murder in Palestine.

(c) The last contention of the appellant is that the accused had a right to have the witnesses, whose names were upon the information, but were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence at the close of the case for the prosecution. The learned Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses, and that they could not say that the learned Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence may cross-examine them if they so wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all Courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses and therefore this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognises that the prosecutor has a discretion as to what

witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such suggestion is made in the present case.

It will be sufficient to go back to the judgment of Baron Alderson in *R.* v. *Woodhead* [1] in which he said, 'You are aware, I presume, of the rule which the Judges have lately laid down, thal a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled. He might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in Court, but they are to be called by the party who wants their evidence. This is the only sensible rule." In reply to the counsel for the prisoner, who asked if he was to understand that if he called them he would make them his own witnesses, Baron Alderson said, "Yes, certainly. That is the proper course, and one which is consistent with other rules of practice."

For instance, if they were called by the prosecutor, it might be contended that he ought to give evidence to show them unworthy of credit, however falsely the witnesses might have deposed. In a later case *R.* v. *Cassidy* [2] Baron Parke stated the correct principle to be "that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury, whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them. He would therefore follow the course said to have been pursued by Campbell, C.J., who ruled that the prosecutor was not bound to call such a witness and that if the prisoner did so, the witnesses should be considered as his own. Cresswell, J., who was consulted by Baron Parke, agreed with this view.

It is consistent with the discretion of counsel for the prosecutor, which is thus recognized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this practice has probably became even more general in recent years, and rightly so but it remains a matter for the discretion of the prosecutor. Archbold, in the 31st edition of 1943, contains a list of a series of decisions, but in none of these has the Court superseded the prosecutor's discretion. The most recent of these was an unreported case of *R.* v. *Nicholson* at the Nottingham Assizes in 1937, where Hawke, J. declined to force the prosecution to call a witness whom they regarded as unnecessary. Reference should also be made to an interlocutory remark by Hewart, C.J. in *R.* v. *Dora Harris* [3] to the effect that "in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury." In their Lordships' view, the learned Judge could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are. It may be noted that under Section 41 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, already referred to, the Court has the right, of its own motion, to call upon persons to give evidence.

This last contention of the appellant, therefore, also fails, and, on the whole matter, their Lordships are of opinion that the appeal should be dismissed, and the judgment of the Court of Criminal Appeal shoul be affirmed, and their Lordships will advise His Majesty accordingly.

Appeal dismissed.

1. (1847) 2 Car & K. 520
2. (1858) 1 F. & F. 79
3. (1927) 2 K. B. 587 (590)

Criminal Appeal No. 277 of 1945

October 16, 1945.

Byers, J.

Sha Hansraj Abayachand and other

v.

Emperor

Hoarding and Profiteering Prevention Ordinance, Section 13 (1) *read with Section* 114 *of the Indian Penal Code—Confiscation under—Whether extends to the whole stock or to the limited quantity demanded for sale.*

Where an enquiry is made by a customer and sale is refused on the ground that no stock is available.

Held, *that the refusal extends to the entire stock in respect of which refusal is made and not merely confined to the actual quantity demanded by the customer for sale to him and that the order of confiscation of the entire stock is valid.*

Appeal against the of order of the Chief Presidency Magistrate, Madras passed in C. C. 66 of 1945.

V. V. Srinivasa Ayyangar & R. Tirumalai Tatachariar, for Applts.

Crown Prosecutor (P. Govinda Menon), for Crown.

JUDGMENT

The two appellants are the proprietor and the salesman of a shop in George Town and they have been convicted on two counts of offences punishable under Section 13 (1) of the Hoarding and Profiteering Prevention Ordinance read with Section 114 of the Indian Penal Code in the case of the 2nd appellant. The proprietor has been fined Rs. 1500 on each of the two counts while the salesman has been fined Rs. 200 on each count. Confiscation of the stock has also been ordered.

The facts so far as they are necessary at this stage are that on 23rd June 1944 two persons went to the shop and asked to be supplied with cuticura toilet powder, krementz shirt studs and playing cards. Each of them went independently and each of them received the same reply that no stocks were available. A search made very shortly afterwards by the Special Assistant Commercial Tax Officer showed that there were large stocks of these articles inside the premises to which the salesman had access. The explanation given by the salesman at the time to the searching officer was that he was not aware of the existence of these stocks, and it was only when the case came on for trial that the appellants revealed their defence. Two letters were produced, one purporting to have been written by the salesman to the proprietor as far back as February 1944 asking for instructions for the disposal of five cases of goods which had arrived from Madura. According to a railway clerk examined as a defence witness these cases contained playing cards,powder, and soap and were despatched on 12th February 1944 from Madura. According to the appellants these goods had been sent out of Madras in April 1942 at the time of the invasion scare to Puducottah and were sent back to Madras in February 1944 after conditions became more settled. The answer of the proprietor to this enquiry by the clerk was dated 31st March 1944 and according to it he was to keep the cases unopened until the proprietor's return in three or four weeks' time, after which he would check the contents and deal with them. The learned Magistrate regarded these two letters with considerable suspicion and he declined to accept the defence put forward, largely because the cases had not been kept in tact by the salesman as directed by the proprietor; on the contrary, the goods were found open in the rooms where they were kept concealed.

On behalf of the appellants Mr. V. V. Srinivasa Ayyangar has pressed this defence; but it is significant that when the shop was raided by the Assistant Commercial Tax Officer no reference was made to the existence of these unopened cases, nor did the salesman suggest that he had stocks which he was unable to sell, because they were awaiting unpacking by the proprietor and the fixing of their selling prices. If the salesman had produced this letter from his employer and shown the Assistant Commercial Tax Officer the unopened cases and given him this explanation, it is very doubtful whether this prosecution would have been made. I agree with the learned Magistrate: in his rejection of these two letters. There can be no doubt from the evidence that P. Ws. 1 and 2 were deliberately refused the supply of goods by the salesman with full knowledge that he had adequate stocks avilable. It may be from the way in which P. Ws. 1 and 2 were careful to ask for these particular goods that they had been sent by the officers of the Supplies Department on information received that blackmarket transactions were going on, but this does not in my view affect the guilt of the appellants. On the facts there is no room for interference with the convictions.

The salesman has been convicted only of abetment; the learned Magistrate taking the view that he must have received his instructions from his proprietor and that in refusing supplies to purchasers he was acting under those instructions and was therefore guilty of abetment. Whether he was acting on his own intiative or whether he was acting only as an abettor is only of academic interest because the proprietor is in any event liable.

Regarding the sentences those imposed on the proprietor are undoubtedly severe but having regard to the offences and the large stocks available I am not prepared to say that they are excessive.

Regarding the orders of confiscation they have been attacked by Mr. Srinivasa Ayyangar on two grounds: firstly in view of the substantial nature of the fines the confiscation amounts to an excessive punishment; and secondly on the ground that there is no power to direct confiscation of the entire stock of the goods for which enquiry was made. Mr. Srinivasa Ayyangar's contention is that if confiscation was necessary it can be directed only

in respect of one pack of cards one set of stud and one tin of toilet powder. If a prospective purchaser were to enter a shop and ask for the sale of a particular article in view on the counter or displayed in the window or show room, there would be room for the argument that refusal to sell related only to the particular article pointed out by the prospective purchaser and of which the sale was required; but where, as in this case, goods are asked for out of the stock believed to exist and the sale is refused on the ground that no stock is available, then I consider that the refusal to sell extends to the entire stock in respect of which the refusal is made. It is in evidence that there were in the shop in this case 67 dozen packs of playing cards and when supplies were refused on the ground that no stock was available, then the refusal extends to each and every pack of cards contained in that entire stock. This contention must be rejected and there remains only the severity of the penalty of confiscation.

Mr. Srinivasa Ayyangar has stated that the value of the stock of which confiscation has been ordered is approximately Rs. 8000. The confiscation of this, taken with the fines, appears at first sight to be excessive but there is evidence to show that illicit transactions in this shop were in all probability frequent. In addition to checking the stocks of these particular articles the Assistant Comercial Tax Officer examined other stocks also. He found that the stock books were far from being up-to date, that price lists were not exhibited, and that large stocks of table knives dessert knives, and other goods had not been brought to account at all. The annual turn over of this business according to the judgment of the learned Magistrate is Rs 3½ lakhs, so that the fine of Rs 3000 is less than 1% of the annual turnover. This is probably trivial when compared with the profits of all the illicit transactions which probably went on. In this view I am unable to agree that the order of confiscation taken with the fines is an excessive punishment. Severe it undoubtedly is but all the circumstances point to the necessity for a severe sentence. The appeal is accordingly dismissed.

S. K. —— *Appeal dismissed*

Criminal Appeal No. 509 of 1945
November 8, 1945.
KUPPUSWAMY AYYAR, J.
The Public Prosecutor
v.
Sheik Masoon and others.

Criminal Procedure Code (V of 1898), Ss. 348 & 349 — Accused charged under Ch. XVII Penal Code—Sending of papers to sub-divisional magistrate for award of proper sentence-Acquittal by sub-divisional magistrate illegal—Proper course—Committal to sessions—Criminal Rules of Practice R. 95.

Four accused were tried by the sub magistrate for offences punishable under Chapter XVII of the Indian Penal Code and convicted. The first accused was an old offender and there was also a charge against him under S. 75, Indian Penal Code. The sub-magistrate felt that he could not award the proper sentence on the first accused and so sent the papers to the sub-divisional magistrate under S. 349 Criminal Procedure Code, who acquitted all the accused.

Held, *that the sub magistrate had no jurisdiction to send the papers to the sub-divisional magistrate but should have committed the accused to sessions under sec.* 348 *and therefore the sub-divisional magistrate had no jurisdiction to acquit the accused.*

Appeal under s. 417 of the Code of Criminal Procedure 1898, against the order of acquittal of the aforesaid respondents (accused) by the Court of the Sub Divisional Magistrate, Narasaraopet in calendar case No. 109 of 1945 on his file (C. C. No. 1238 of 1944 on the file of the Stationary Sub Magistrate, Narasaraopet).

Public Prosecutor (*V.L. Ethiraj*) for Crown.

G. Gopalaswami, V. T. Rangaswami Ayyangar & K. Kalyanasundaram, for accused.

JUDGMENT

This is an appeal against the order of acquittal of the Sub Divisional Magistrate of Narasaraopet in C.C. No. 109 of 1945 on his file. The four accused were originally tried by the Sub Magistrate of Narasaraopet for offences punishable under Section 380 I.P.C. so far as accused 1 and 2 were concerned and for offences punishable under Sections 410 and 411 I.P.C. so far as accused 3 and 4 were concerned, in respect of the same articles. They were all tried together and found guilty of the offences with which they were charged; but as the first accused was an old offender who had been convicted for an offence under the provisions of Chapter XVII of the Indian Penal Code there was also charge against him under Section 75 I.P.C. The Magistrate felt that he could not award the proper sentence on the first accused and so sent the papers to the Sub Divisional Magistrate of Narasaraopet under Section 349 Cr. P.C. This Magistrate acquitted all the accused and it is against this order of acquittal that this appeal has been filed.

It is rightly urged for the Crown that the Sub Divisional Magistrate, Narasaraopet, had no jurisdiction to try the case and acquit the accused inasmuch as the Sub Magistrate ought to have committed the accused to sessions under Section 348 Cr. P.C. if he thought that he could not pass the adequate sentence and should not have taken action under Section 349. The Sub Divisional Magistrate, Narasaraopet could have jurisdiction to acquit the accused only if the papers could have been sent to him under Section 348. Section 349 is a general section which applies to all offences whereas Section 348 applies only to persons who have been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code in any prior case, and according to section 348(2).

"When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under s. 209."

In this case the Magistrate knew that the first accused had been convicted of an offence punishable under Chapter XVII of the Indian Penal Code and he also knew that none of the accused could be discharged but would have to be convicted. At this stage he should not have sent the papers under section 349 Cr. P. C. to the Sub Divisional Magistrate. The proper course for him would be to commit the accused to sessions. This is also clear from Rule 95 of the Criminal Rules of Practice. As the Magistrate therefore had no jurisdiction to send the papers and should have committed the accused to sessions under section 348, the Sub Divisional Magistrate had no jurisdiction to acquit the accused.

I accordingly set aside the order of acquittal and send the papers to the Sub Magistrate of Narasaraopet for taking action under section 348 Cr.P.C. If the Magistrate who tried the case originally is not there, there may have to be a *de novo* enquiry.

N.T.R. —

Criminal Revision Case No. 675 of 1945.
(Criminal Revision Petition No. 631 of 1945)
(*November* 1, 1945)

CHANDRASEKARA AIYAR, J.

Kaza Satyanarayana and others

v.

Emperor

Gaming Act (Madras Act III of 1933), *Ss.* 3 *&* 6—*Scope of section* 6—*Element of profit or gain necessary to constitute common gaming house.*

The finding of cards, dice, gaming table or cloth, board or other instruments of gaming in any place entered or searched under the provisions of section 5 *of the Madras Gaming Act or on any person found therein is only a piece of evidence in support of the prosecution. It is not a conclusive piece of evidence warranting a finding of guilty without anything more.*

Under the definition of a common gaming house the element of profit or gain is an essential ingredient and when this has been negatived there is nothing to warrant a conviction under section 9.

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Joint Magistrate of Bezwada dated 25-4-1945 and passed in Criminal Appeal No. 22 of 1945 preferred against the Judgment of the Court of the Stationary Sub-Magistrate of Gudivada in C. C. No. 1791 of 1944.

K. S. Jayarama Iyer & C. K. Venkatanarasimham, for accused.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The learned Sub-Divisional Magistrate has misdirected himself on the meaning, scope and effect of section 6 of the Gaming Act. All that the section says is that "any cards, dice, gaming table or cloth, board or other instruments of gaming found in any place entered or searched under the provisions of section 5, or on any person found therein shall be evidence that such place is used as a common gaming house, and that the persons found therein were there present for the purpose of gaming, although no play was actully seen by the police officer or any of his assistants." It is only a piece of evidence in support of the prosecution. He was wrong in thinking that it was a conclusive piece of evidence warranting a finding of guilty without anything more. On the other hand, in this case, the trial Court found on the evidence adduced that the third accused was not using the house for purposes of any profit. These are his words; "The evidence adduced shows that the accused is not deriving any profits by running a gaming house," Under the definition of a common gaming house, the element of profit or gain is an essential ingredient and, when this has been negatived, there is nothing to warrant a conviction under section 9, which postulates of course the position that the persons found gaming were present for the purpose of gaming in a common gaming house.

The convictions are set aside and the fines if paid, will be refunded. The property seized will be delivered back to those from whom they were seized.

N. T. R. — ***Convicion set aside.***

Cr. App. Nos. 366, 376, 377, 395 & 396 of 1945
October 29, 1945
Sir Lionel Leach, C. J. & Lakshmana, Rao J.

M. K. Thiyagaraja Bagavathar and others
v.
King Emperor

Criminal Procedure Code (V of 1898) Section 411-A(1) (a) (b)—Powers of Appellate Court in appeals involving questions of fact under.

In an appeal under Section 411-A (1) (b) of the Code of Criminal Procedure, the Court has full power to set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case it is convinced that the verdict is unreasonable.

Both in England and in India it has become a rule of practice and it is now virtually a rule of law that corroboration is required to base a conviction on the evidence of an accomplice.

It is also an accepted rule that one accomplice cannot corroborate another.

Rex. v. *Baskerville*, (1916) 2 *K. B.* 650; *Rex* v. *Everest, 2 Cr. App. R.* 130, *Elizabeth Perfect* 12 *Cr. App. R.* 373; *Sheo Swarup* v. *King Emperor, I. L. R.* 56 *All.* 645 *considered.*

Appeal against the judgment of the High Court, Crown side dated 3-5-1945 and passed in Case No. 3 of Second Criminal Sessions of 1945.

V. T. Rangaswami Iyengar, K. Kalyanasundaram, R. Santanam, V. V. Srinivasa Iyengar, M. Srinivasagopalan, V. V. Radhakrishnan, C. Ramanna, B. T. Sundararajan, S. Krishnamurthi, V. C. Gopalarathnam, P. Ramanathan & M. Santhosh, for Applts.

Advocate General (K. Rajah Iyer) & Crown Prosecutor (P. Govinda Menon), for the Crown.

JUDGMENT

(Sir Lionel Leach, C. J.)

On the 8th November 1944 one C. N. Lakshmikantham was stabbed while riding in a rickshaw in General Collins Road, Madras. He received three wounds and died as the result in the Madras General Hospital in the early hours of the next day. Eight persons were charged with being concerned in the murder and were committed for trial at the High Court Sessions in April of this year. All the accused were charged with being parties to a conspiracy to murder Lakshmikantham. The first and second accused were also charged with having committed the murder. The third, fourth, fifth, sixth, seventh and eighth accused were charged with abetment as well as conspiracy. During the trial a *nolle prosequi* was entered in respect of the fifth accused and thereupon he was discharged. The jury unanimously found the first accused and second accused guilty of the conspiracy and of having committed the murder. By a majority of 6 to 3 they found the third and fourth accused guilty on the conspiracy charge and of having abetted the murder. They unanimously found the sixth and seventh accused guilty on the conspiracy charge and of abetment. By a majority of 6 to 3 they acquitted the eighth accused. The learned Judge (Mockett, J.) accepted the majority verdicts. He sentenced the first, second, third, fourth, sixth and seventh accused to transportation for life and acquitted the eighth accused.

By an order dated the 12th July 1945 this Court allowed the third and fourth accused to appeal on facts as well as on law under section 411-A (1) (b) of the Code of Criminal Procedure. It refused leave to the other accused to appeal on facts, but they have all appealed under clause (a) of the sub-section.

We will deal with the appeal of the third and fourth accused first and then with the appeals of the first, second, sixth and seventh accused in that order. The appeal of the third and fourth accused being on facts as well as on law it is necessary to discuss and decide what are the powers of the Appeallate Court in appeals under Section 411-A (1) (b) of the Code of Criminal Procedure. Before the passing of the Criminal Procedure Amendment Act of 1943 there was no appeal from a verdict of a jury at High Court Sessions on facts. It is unnecessary to quote the whole section. It is sufficient for the purposes of this case to quote sub-sections (1) and (2). They read as follows:—

"(1) Without prejudice to the provisions of s. 449 any person convicted on a trial held by a High Court in the exercise of its original Criminal jurisdiction may, notwithstanding anything contained in s. 418 or s. 423 sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court.....

(a) against the conviction on any ground of appeal which involves a matter of law only;

(b) with the leave of the appellate Court, or upon the certificate of the judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be a sufficient ground of appeal; and

(c) with the leave of the appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in s. 417 the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding

anything contained in s. 418 or s. 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clau e (b) and clause (c) sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law".

Clauses (a), (b) and (c) of sub-section (1) follow clauses (a), (b) and (c) of section (3) of the English Act, Criminal Appeal Act, 1907. Section 4 of the English Act provides;

"(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed and in any other case dismiss the appeal."

There is no provision in the Code of Criminal Procedure corresponding to sub-section (1) of section 4 of the English Act, but we do not consider that the omission affects the powers of an Indian High Court when hearing an appeal under Section 411-A (1) (b), either by way of extending or limiting them. It is, however, relevant to point out that section 423 of the Code permits the appellate Court to alter the finding or direct a re-trial. It cannot, however, in an appeal under section 411 A enhance the sentence.

In *Rex* v. *Baskerville* [1] the Court of Criminal Appeal (Lord Reading, C. J., Scrutton, Avory, Rowlatt and Atkin, JJ.) laid down the principles which governed the Court in deciding an appeal from the verdict of a jury on the facts. In that case one of the questions was whether there had been corroboration in a material particular of the evidence of two accomplices. In *Rex* v. *Everest* [2] the Court has said:

"The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some purticular which goes to implicate the accused."

The learned Judges who decided *Rex* v. *Baskerville* [1] said that the words "tell the jury to acquit" should read "warn the jury of the danger of convicting" In delivering the judgment of the Court in that case Lord Reading said:—

"If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this Court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury warning or advice above-mentioned if this Court, after considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence."

In a later case, *Elizabeth Perfect* [3] the Court of Criminal Appeal had to decide an appeal where the Judge considered the verdict of the jury to be wrong and had given a certificate permitting the appeal. It was not alleged that there had been any misdirection to the jury, that any evidence was wrongly admitted or that there was no evidence on which the jury could convict. There Lord Reading said:

"The questions in issue at the trial were purely questions of fact, and were, therefore, for the determination of the jury, and not for that of the judge. Unless we, sitting in this Court, are prepared to say that, when a Judge differs from a jury on a finding of fact, we ought to conclude that the verdict is unreasonable, or that there has been a miscarriage of justice, we cannot quash this conviction. Substantially, the only evidence given was that of the prosecutor and that of the appellant. It was for the jury to say which they believed and to decide accordingly, bearing in mind—that a doubtful case must result in a verdict of acquittal. In these circumstances it seems to us that we must accept the decision of the jury on the facts, and that we are not in a position to quash this conviction, unless we substitute ourselves as a tribunal of fact when we do not have, as had the jury, the opportunity of hearing and seeing the witnesses. Therefore, this appeal must be dismissed."

In *Sheo Swarup* v. *King Emperor* [4] the Privy Council discussed the functions of a High Court in an appeal under section 417 of the Code of Criminal Procedure on an order of acquittal made by a Sessions Judge sitting without a jury, but with assessors. It was pointed out that sections 417, 418 and 423 of the Code give the High Court full power to review at large the evidence upon which the order of acquittal was founded and to reach

1. (1916) 2 K.B. 659
2. 2 Cr. App. R. 130
3. 12 Cr. App. R. 273
4. (1934) M.W.N. 1017; Cr. 193: 56 All. 645 P.C.

the conclusion that upon that evidence the order of acquittal should be reversed. The judgment of the Board was delivered by Lord Russell of Killowen, who observed:

"But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with the rules and principles well known and recognised in the administration of justice."

The same considerations must apply in an appeal under section 411-A (1) (b) on a matter involving a question of fact. We hold that in an appeal under that clause the Court has full power to set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case it is convinced that the verdict is unreasonable.

Before passing on to the consideration of the facts in this case we will state the position when the chief witness for the prosecution is an approver. Section 133 of the Indian Evidence Act states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Under the English common law the same rule applies, but both in England and in India it has become a rule of practice, and to use the language of the Privy Council in *Mahadeo* v. *The King* (5) it is now virtually a rule of law, that corroboration is required. It is also an accepted rule that one accomplice cannot corroborate another; but section 30 of the Indian Evidence Act says that when more persons than one are being tried jointly for the same offence, and a confession made by one affecting himself and some of the others is proved, the Court may "take into consideration" the confession as against the others as well as against the person who makes the confession. There is no corresponding provision in English law. In the recent case of *In re. Rajagopal* (6) a Full Bench of this Court had to consider the effect of this section and it accepted as correct the interpretation to be found in Woodroffe and Ameer Ali's Law of Evidence, Ninth Edition, at page 312:—

"These words (the words "take into consideration") do not mean that the confession is to have the force of sworn testimony. Buch such a confession is nevertheless evidence in the sense that it is a matter which the Court, before whom it is made, may take into consideration in order to determine whether the issue of guilt is proved or not. The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration of all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence."

In the present case there is evidence of a confession of one of the accused implicating himself and other accused. The learned Judge in answer to a question put to him by the jury said that they should bear in mind the warning that an accomplice cannot corroborate an accomplice and that they should not attach much value to a statement by a co-accused.

In *Miraza Akbar* v. *The King Emperor* (7) the Privy Council held that the common intention in section 10 of the Indian Evidence Act signifies a common intention existing at the time when the thing was said, done or written by one of the conspirators. Any statement on confession made by one conspirator to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against another. In that case their Lordships had not to consider the effect of section 30 of the Indian Evidence Act.

We now come to the facts which have general application. Lakshmikantham was a person of a bad character. In 1932 he was convicted of forging an affidavit and sentenced to undergo imprisonment for a period of seven years. He was released from prison in 1939. In 1943 he edited a weekly publication called "The Cinema Thoothu" but it ceased publication in January 1944. On the 22nd July 1944 he became the editor of another weekly paper called "The Hindu Nesan" which he continued to edit until his death. He professed to have a mission in life to protect the chastity of Indian womanhood, but his profession was merely a cloak for the writing of most scurrilous articles attacking the characters of prominent persons, especially persons well known in the cinema world. Among the persons he attacked were the third and fourth accused, both of whom were cinema actors and prominent in their profession. The articles which he had written against these accused were put in evidence at the trial. They accuse them of seduction of innocent girls and the wife of

5. (1936) M.W.N. 889; Cr. 165 P.C.
6. (1943) M.W.N. 793; Cr. 181; I.L.R. (1944) Mad. 308
7. (1940) M.W.N. 1112; Cr. 156; 21 Lah. 819 P.C.

the fourth accused of being a prostitute. Week after week he returned to the attack and in the same scurrilous manner. In the early part of 1944 the third and fourth accused along with other persons who had been the victims of Lakshmikantham's defamatory pen presented a petition to His Excellency the Governor praying that action should be taken against Lakshmikantham. It is the case for the prosecution that these attacks provided the motive for the third and fourth accused entering into a conspiracy to murder Lakshmikantam. It is said for the defence that there were equally scurrilous articles against many other prominent persons and that there was equally strong ground for suspecting that the murder might have been instigated by others. This may be the case, but the grossly defamatory articles written by Lakshmikantham may very properly be taken into account when considering why the third and fourth accused should take part in the conspiracy.

On the 19th October 1944 Lakshmikantham was assaulted and stabbed in the neck in Venkatachala Mudali Street, Madras. The injury inflicted was not of a serious nature and had nothing to do with his death. He alleged that his assailant was the first accused and he wanted the police to prosecute him. The police, however, could not take up the case as it was non-cognizable. The result was that Lakshmikantham decided to file a complaint to the Magistrate against the first accused. In this connection he consulted Mr. J. Nargunam, an advocate of this Court, on the night of 7th November 1944. Mr. Nargunam drafted the complaint and gave it to Lakshmikantham to have it typed. About 9 a.m. on the 8th November Lakshmikantham arrived at Mr. Nargunam's house with the typed complaint. He left Mr. Nargunams's house at about 10 a.m. in a rickshaw, taking the complaint with him. He was attacked and fatally stabbed a few minutes later in General Collins Road. The scene of the attack was some 130 yards from Mr. Nargunam's house.

On the 11th December 1944 the police arrested Jayanandam, who became the approver. We shall refer to him as such hereafter. The approver was in custody at the Egmore police station from the 11th to 14th December. On the 15th December he was taken before the Fifth Presidency Magistrate as he had intimated that he wished to make a confession. When he appeared before the Magistrate he refused to make any statement. That afternoon he was taken to the Penitentiary where he remained until the afternoon of the 16th December. On that day he was again placed in the custody of the investigating police officer and detained in the Egmore Police Station. Rule 86 (3) of the Criminal Rules of Practice states that an accused, who has been produced before a Magistrate for the purpose of making a confession and who has declined to make it or has made a statement which from the point of view of the prosecution is unsatisfactory, shall not be remanded to police custody. If he is remanded to other custody the investigating police officers shall not, except in the presence of the Magistrate, be allowed either to see him again or to have any further communication with him. The order of the Commissioner of Police of the 16th December directing the approver to be detained at the Egmore Police Station was improper, but there is no reason to believe that it was passed otherwise than by oversight and we consider that the approver's subsequent confession was not the result of such detention.

On the afternoon of the 17th December the approver was taken to the Saidapet sub-jail and thereafter he was never in police custody. That evening he wrote a letter to the Commissioner of Police in which he stated that he was going to talk to the Presidency Magistrate touching matters relating to the murder case of Lakshmikantham and praying that he might be sent to the Magistrate. He explained that his failure to make a statement when sent before the Fifth Presidency Magistrate on the 15th December was the result of threats made by Nagalingam (the second accused) and his relatives. On the 19th December he wrote out in his own hand a petition to the Chief Presidency Magistrate in which he intimated that he wished to make a confession. In this petition he set out statements of fact which agree with the statement of fact which he subsequently made in his confession. The confession was made on the 22nd December and duly recorded under section 164 of the Code of Criminal Procedure by the Sub-Divisional Magistrate of Saidapet. It may be summarized as follows:—

He and his sister had been attacked by Lakshmikantham in an issue of "The Hindu Nesan". On the 7th November 1944 the second accused came to him and told him that arrangements had been made to do away with Lakshmikantham. Thereupon he asked the second accused how he could perform such a dangerous and big feat. The second accused replied that the third and fourth accused

would supply any amount of money and also defend them if they were caught. He then persuaded the approver to follow him to the People's Park where the rest of "the gang" were waiting. They went by tram to the Moore Market, where they met the seventh, first and sixth accused and two others. There the second accused showed the first accused to the approver and said that he was the first assailant of Lakshmikantham and that he was prepared to kill him the next day. The sixth accused asked the approver whether the second accused had told him all about the plot and he said that he had. The sixth accused explained that they were on a dangerous expedition and that if by any chance anyone was caught he should not show up his friends "even if torn from limb to limb." Kamalanathan (P.W. 25) who was there was introduced as the person who was going to finance the "whole show." The eighth accused was also introduced to him. Kamalanathan said that they should go and meet the "big persons" and fix up the whole of the affair. They were taken to Wall Tax Road "Ottavadai Theatre" and asked to stop outside. Kamalanathan went inside and asked them to come in one by one when he made signs. Fifteen minutes later Kamalanathan returned with a man who had side wiskers and asked them to go in. The eighth accused stopped outside at a place where the tram turned. The first accused waited on a platform in front of a coffee hotel. The approver, Kamalanathan, the sixth accused, the second accused and the seventh accused were taken to the make-up room in the theatre. The third and fourth accused then came into the room. The third accused said that doing away with Lakshmikanthan was a very tough job and he wanted to know whether they could do the job thoroughly. The second and seventh accused said that they would see the thing through without missing it. The third accused then impressed upon them the necessity for extreme secrecy and caution and said that if they gave up their names they would be disgraced for life. The third accused said that he would pay them Rs. 2,500 as promised as soon as the work was completed and that if the job was done thoroughly he would give further presents. He further said that if by any chance they were detected he and his friends would give them all the help possible. At the instigation of the third and fourth accused they took an oath that even if they lost their heads they would not expose the third and fourth accused. The fourth accused gave to the sixth accused Rs. 500 and promised the remaining Rs. 2,000 "after completing the job." They took the money to the People's Park where the first and eight accused joined them. The sixth accused gave him (the approver) Rs. 50 and asked him to meet him the next morning. At about 4-45 a.m. on the next day the second accused came to his house and woke him up. He and the second accused went together to Perambur Barracks Road and at a tea shop there they met the seventh, sixth and eighth accused. The seventh accused told him that they need not be frightened and that the second and first accused would be doing the work and all that they had to do was to be there and help them if necessary. The eighth accused went away to watch the house of Lakshmikantham. They sat in a tea shop. At about 9 a.m. the eighth accused came running and asked them to get ready. The sixth accused called them and they all went outside and the eighth accused showed them Lakshmikantham going in a rickshaw. The first accused said that the place was not suited for the purpose and asked them to wait for Lakshmikantham's return. They followed the rickshaw and stopped near the tram road. The sixth accused went into the Y.M.C.A. building closeby. Lakshmikantham went into the house of his lawyer, Mr. Nargunam, who was living in the next street. He (the approver) was asked to stand along with the seventh and second accused in the street next to that in which the lawyer lived. He remained their talking to the people who were milking cows in a shed closeby. The first and second accused went and stood on the other side of the house. A little later the rickshaw came out of the vakil's house. The first and second accused followed the rickshaw. He and the seventh accused stopped near the shed. A little later the second accused came running and signed to him to run away. The seventh accused also asked him to clear out and he ran away to his house. The next day he learned that the first accused had been arrested.

In his confession the approver, of course, referred to the various accused persons by name. In the foregoing summary we have for the sake of brevity omitted the names and have referred to them by their designations at the trial.

A pardon was tendered to the approver and accepted by him. He gave evidence in the Committal Court on the 22nd February 1945 and his testimony there was in accordance with the statements which he had made in his confessional statement. He was called as a

witness in the Sessions Court on the 9th April 1945 when he retracted his confession and said that he had made it as the result of having been tortured by the police. Thereupon the approver's deposition in the committal court was treated as evidence in the case by reason of the provisions of section 288 of the Code of Criminal Procedure.

On the 9th November A. K. Ramanna (P. W. 26) wrote a letter to a friend named V. S. Mani Ayyar (P.W. 28) who was then at Salem. In this letter he stated that at about 10-30 a m the previous day Lakshmikantham had been stabbed and that he died at 4 a. m. the next day. The letter also contained this statement :

"Yesterday morning at 11 O'clock...came to me and informed me that he had done away with the life of C.N.L. and warning me not to publish this news went away."

The letter was opened by the censor, who on the 11th November sent a photographic copy of it to the police as it contained a clue to the murder of Lakshmikantham. The letter was reposted and delivered to the addressee on the 14th November. The police had arranged that Inspector K. V. Venkatasubramaniam (P. W. 29) should be present when the letter was delivered. At the time of delivery the addressee was asked who was the writer. The letter had not been signed by Ramanna, but, merely bore the intials "A. K. R." at the place of signature. V. S. Mani Ayyar said the writer was Ramanna whose address he gave. The Inspector telephoned to Madras and Ramanna was traced and questioned that night. He admitted that it was his letter. In his evidence at the Sessions Court he said that the person whose name was left blank was the six accused. It may be mentioned that Ramannna was living as a paying guest in the house of V. S. Mani Ayyar in Madras.

In his evidence Ramanna also stated that at about 4-30 or 5. P. M. on the 8th November the sixth accused came to him and said, "Give me your hand". His face at that time was frightful to look at. The sixth accused told him, "I have done away with Lakshmikantham", and when asked who did it he said : "Two of my insignificant fellows did it." He further said, "Thiagarajan, N. S. Krishnan and Sriramulu all of us joined together and had done this. If ultimately however, the case comes to light they should use their influence and go up to the Viceroy and get the case dismissed." Thiagarajan is the third accused, N. S. Krishnan the fourth accused and Sriramulu the fifth accused. He also said, "I have just now seen Bhagavathar and Sriramulu Naidu and I have come here." Bhagavather is the third accused.

Ramanna stated that he knew the third accused well. He had known him from 1936 and the fourth accused since 1943.

Kamalanathan was examined as the twenty-fifth witness for the prosecution and admitted that he had been at the Wall Tax theatre on the evening of the 7th November and that he had met there the approver, the second, third, fourth, sixth and seventh accused, but he professed that he only went there to induce the third accused to transfer to Madras a newspaper which he was publishing in Trichinopoly and to give him (Kamalanathan) employment in connection with it.

In his summing up the learned Judge more than amply warned the jury of the danger of accepting the approver's evidence and he indicated that Kamalanathan should be treated as an accomplice whose testimony could not be used to corroborate the approver. He also warned them that when taking into consideration the confession of the sixth accused to the witness Ramanna, under section 30 of the Evidence Act, an accomplice could not corroborate another accomplice. We have been taken through the relevant portions of the learned Judge's summing up and the third and fourth accused can have no complaint about his fairness. The same observation also applies to the summing up as far as the other accused are concerned.

It has been suggested that there was a misdirection on the defence of *alibi* set up by the fourth accused. This defence was only raised in the Sessions Court, although in the committal Court the fourth accused did say that he was in Salem at the time. The learned Judge told the jury that in his opinion it was regrettable that this was not disclosed before and quoted to them a passage from the judgment of Lord Alverstone, C.J. in *Rex* v. *George William Mc. Nair* [8] where the learned Chief Justice said that if a person charged with an offence were ill advised enough to say he would reserve his defence, and to keep back what he alleged to be the true story so that it could not be investigated before the trial the fact that his story as told at the trial was not believed by the jury was not a ground for interfering with the verdict. The sooner an innocent man told the truth the better it was for him. We can see no just cause for complaint here.

In criticising the summing up in this connection the learned counsel for the appellant

8. 25 Times Law Reports 228

relied on the decision of the Court of Criminal Appeal in *The King* v. *Naylor* (9). Where a prisoner before his committal for trial, was cautioned in the words prescribed by the Criminal Justice Act, 1925, section 12 sub-section (2) namely, "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, 'but whatever you say will be taken down in writing and may be given in evidence upon your trial". In reply the prisoner said, "I do not wish to say anything, except that I am innocent." At the trial at quarter sessions, the Recorder commented on the failure of the prisoner to make a more complete statement and said to the jury: "Surely, if he is innocent one would think he would make his defence then and there." It was held that this was a misdirection because the true intention of the caution was to convey to an accused person the information that he was not obliged to say anything, unless he desired to do so. That case has no application here. As we have said we do not regard the learned Judge's comment as amounting to a misdirection and moreover he left the question to the jury quite open.

Now what had the jury before them on which to base their verdict in respect of the third and fourth accused? In the first place there was the deposition of the approver treated as evidence under section 288 of the Code of Criminal Procedure which they were entitled to accept if they were convinced that the statements made in it were true. The statements in it accord with what he said in his petition to the Chief Presidency Magistrate and with his confession to the Sub-Divisional Magistrate. Of course, the approver could not corroborate himself, but the fact that he was consistent in what he said in these lengthy statements is noteworthy. That he retracted his confession and repudiated evidence in the committal court is not of great importance. The jury saw him in the witness box and were in a position to form an opinion whether he was then speaking the truth.

The prosecution had shown a motive for the third and fourth accused taking part in the conspiracy and agreeing to pay the assassins and have them defended should they be caught. Certainly the third and fourth accused must have been very embittered against Lakshmikantham. Then there was the confession of the sixth accused to the witness Ramanna which the jury were entitled to take into consideration.

In these circumstances can it be said that the verdict of the majority of the jury in respect of third and fourth accused was unreasonable? We consider that the answer must be in the negative. They had been properly directed and there was material on which their decision could with reason be based. It follows that the appeal of the third and fourth accused must be dismissed.

The approver's evidence against the first accused is corroborated by Gopal the puller of the rickshaw in which Lakshmikantham was stabbed. This witness identified the first and second accused as the assailants. On behalf of the first accused it was said that the pardon was illegal, that the approver's statement should not have been admitted in evidence under section 288 of the Code of Criminal Procedure and that the approver had been induced to confess. Section 337 of the Code of Criminal Procedure says that in the case of an offence triable exclusively by the High Court or Court of Session and certain other offences the District Magistrate, a Presidency Magistrate, a Sub Divisional Magistrate or a Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of a person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to him on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. Section 339 provides that where a pardon has been tendered and the Public Prosecutor certifies that in his opinion a person who has accepted the tender has either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made may be tried for the offence in respect of which the pardon was tendered or for any other offence of which he appears to have been guilty in connection with the same matter.

As we have already said the confession was recorded by the Sub Divisional Magistrate, Saidapet, on the 22nd December 1944. On the 2nd January 1945 the approver was taken before the Chief Presidency Magistrate who asked him whether he had made a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every person concerned, whether as principal or as abettor in the commission of the offence, to the Sub

9. (1932) 1 K.B. 685

Divisional Magistrate, and his answer was "Yes". To the question whether that statement was voluntarily made and whether he understood the consequences he again replied 'yes'. He was asked whether he was prepared to stand by that statement in the Court at the trial of the case. He said that he was. He was then asked "Are you aware that you are liable for prosecution for the offence (of conspiracy to murder and murder) if you resile from the statement you made to the Sub Divisional Magistrate, Saidapet? Again he answered "Yes". It is suggested that the answer to the last question implied that he was granted the pardon on the condition that he did not resile from his confession. We consider that this argument is entirely unsustainable. The Chief Presidency Magistrate had merely warned him of the action that might be taken against him under section 339 if he gave false evidence.

There is equally no substance in the suggestion that the approver's deposition was unlawfully accepted in evidence. It was admitted in evidence under section 288 of the Code of Criminal Procedure and the section certainly permits of the admission.

The suggestion that the approver was induced to make the confession is based on the concluding sentence of his petition to the Chief Presidency Magistrate on the 19th December 1944 where he said :—

"I did not tell the Court because Nagalingam threatened me previously that if we told the truth before the Court myself and the rest must go to the gallows. This is truth, I request I may be examined and saved. This is truth."

The suggestion is that he made the confession because he understood that by doing so he would go free. The answer to that is provided by the answer to the last question put by the Chief Presidency Magistrate before tendering the pardon: "Are you aware that the tender of pardon is no bar to your being prosecuted for the offences?" The answer was again "Yes". It may be pointed out that when the approver retracted his confession at the trial he made no suggestion that inducement had been held out to him but alleged maltreatment by the police. The case now set up is quite inconsistent with the approver's own case and is obviously a mere afterthought.

Counsel for the first accused also contended that the learned Judge had misdirected the jury on two points. The first objection has reference to the evidence of Dr Joseph of the Madras General Hospital. The Accident Register relating to the admission of Lakshmikantham on the morning of the 8th November 1944 contains this statement:—"Alleged to have been caused by a bichuwa at 10 A.M. 8-11-44 on the road near Chengalraya Naicker's estate turning of Presentation Convent. Name (not known)." The prosecution suggested that the words "Name Not known" had been inserted afterwards, but Dr. Joseph's evidence was to the effect that the entries in the register were all made at the same time. In his summing up the learned Judge said :—

"You remember that the prosecution refused to call Dr. Joseph. The position is quite clear and we have the great advantage of the Judicial Committee laying it down that there is no necessity on the prosecution to call a witness they do not think is telling the truth. You have merely got gentlemen to look at the "Name Not known" entry. You remember gentlemen I insisted he should be before the Court and because the prosecution does not call him it does not follow that he is not speaking the truth."

This certainly did not indicate that Dr. Joseph was unworthy of credence and again the matter was left for the jury to decide.

The second complaint is that the learned Judge did not explain to the jury the difference between murder and culpable homicide not amounting to murder. There was no reason for the learned Judge to enter into any discussion of what was meant by culpable homicide not amounting to murder. Lakshmikantham had clearly been murdered and no one had suggested that the crime was culpable homicide not amounting to murder. The learned Judge told the jury that the offence was either murder or grievous hurt. If they were satisfied that Lakshmikantham died as the result of the stabbing it was unnecessary for him to tell them that that was murder, and there was no doubt about it. The appeal of the first accused is dismissed.

There was even more corroborative evidence against the second accused. Three witnesses, Muniswami Naidu (P. W. 22), Madanagopal Naidu (P.W. 21) and Chittibabu (P.W. 23) milkmen carrying on business in the vicinity of the scene of crime, all speak to having seen the second accused in the neighbourhood on the morning of the crime. Munisami Naidu stated that the second accused spoke to him shortly before Lakshimikantham was stabbed. Madanagopal and Chittibabu deposed that they saw three people running away and both of them identified the second accused as one of them. Madanagopal Naidu also identified the other two as being the 7th accused and the approver. In addition to recognising the second accused Chittibabu recognised the approver.

It has been suggested on behalf of the second accused that the learned Judge misdirected the jury with regard to Lakshmikantham's knowledge of the second accused and that there were further misdirections in that he did not point out to them that there was no evidence of motive so far as the second accused was concerned and that he did not mention that the second accused was only identified 34 days after the crime.

The question of Lakshmikantham's knowledge of the second accused is not a matter of importance, but in any event we consider there was no misdirection. What the jury had to consider was whether they could believe the evidence that the second accused had actually taken part in the stabbing and they were convinced that the evidence was sufficient for the purpose. It was not necessary for the prosecution to prove motive on the part of the second accused. The case against him was that he was a hired assassin. With regard to the third point learned counsel said that the learned judge stated that the first accused was identified within 48 hours but he did not emphasize that it was 34 days after the crime that the second accused was identified. The evidence was that the second accused was arrested on the date of his identification, the 12th December, 1944. The jury accepted the evidence of identification. The appeal of the second accused is dismissed.

In the case of the sixth accused there is the evidence of the approver, Ramanna and Muthukrishna Naidu (P. W. 20). The evidence of the last mentioned witness has not yet been referred to. He is the proprietor of a cycle shop in the neighbourhood of the scene of the crime. He was acquainted with the first, sixth and seventh accused. He had known the first accused for a year, the seventh accused for two years and the sixth accussed for ten to fifteen years. On the morning of the 8th November 1944 he saw the first accused and three others turning into Kelly's Road from the Purasawalkam High Road. Just opposite to the Purasawalkam market there is a Hindu military hotel which is two or three furlongs away from the scene of the murder. The witness said that he saw the sixth and seventh accused standing opposite to the hotel and were there joined by the first accused. This was about 7.45 or 8 a.m. He went into the hotel himself for meal and was inside for ten minutes. He heard that day that Lakshmikantham was stabbed.

In this case it is said that the learned Judge misdirected the jury because he did not conform to section 297 of the Code of Criminal Procedure, he did not address the jury on the absence of motive and he did not mention in his summing up that Ramanna was inimically disposed towards the sixth accused and had himself been in police custody for three days.

Section 297 provides that in cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided. We have already referred to the careful manner in which the learned Judge summed up and it is idle to say that he disregarded the provisions of this section. In this case as in the case of the second accused no motive was suggested. The case rested on direct evidence against the accused and the jury believed that evidence. There is no evidence at all to support the suggestion that Ramanna bore enmity against the sixth accused. The suggestion that the learned Judge should have told the jury that Ramanna had been detained by the police for examination must also be rejected. The fact that he had been detained and examined by the police could not necesarily mean that his evidence was open to suspicion. The police had to examine him because of the letter which he had written to V. S. Mani Ayyar in Salem. Nothing was found against him and he was released from detention. The appeal of the sixth accused is dismissed.

The case against the seventh accused rests on the evidence of the approver, Muthukrishna Naidu the cycle shop keeper and Madanagopal Naidu (the milkman). The evidence of Madanagopal Naidu and Muthukrishna Naidu provides important corroboration of the evidence of the approver against the seventh accused. All that counsel can say here is that the learned Judge had not put forward his client's case sufficiently strongly in his favour. This is what the learned Judge said :

> "Madanagopal identifies accused 2 and 7; Chittibabu accused 2 and the approver but not accused 7. That is very important. They did not both identify accused 7. So if they had been got at, why should they both not identify accused 7? It is a matter for you to consider."

In view of this it cannot be said with reason that the case of the seventh accused was not put strongly enough. His appeal is dismissed.

We may add that in accepting the majority verdicts of the jury the learned Judge showed that he agreed with their findings and this is

a matter which this Court is also entitled to take into account when considering the reasonableness of these findings. We may further add that at the end of his summing up the learned Judge paid the following tribute to the jury for the manner in which they had followed the case :—

"In about five minutes I propose to release you from your duty of deciding the facts of this case. I have not said much about it before although counsel have. But I cannot possibly refrain from paying a tribute to you. Whatever the result of your decision, that does not matter. I cannot picture any jury could possibly have given greater and more conscientious attention to this case than you. I do not know whether your questions have been counted but I have quite a sheaf of them. They are all here and they will be attached to the record. Time and again you have asked questions. That is of very great comfort to me and to counsel because it shows that a serious case of this sort is not being treated in a light hearted manner but with all the seriousness it deserves. As I said, when this case is over you will not regret the immense trouble you have taken over this."

There can be no doubt that all the accused had a very fair trial. The convictions and sentences are confirmed.

N.T.R. —— *Conviction confirmed.*

FEDERAL COURT.

(Appeal from Calcutta.)

Criminal Appeal No. 1 of 1945
April 9, 1945.

SIR PATRICK SPENS, C. J. SIR S. VARADACHARIAR & SIR MD. ZAFRULLA KHAN, JJ.

Biswanath Khemka v. Emperor

Government of India Act, 1935, *S.* 256—*Effect of.*

The direction laid down in section 256, *Government of India Act is directory and not mandatory, and non-compliance with it would not render an appointment otherwise regularly and validly made, ineffective or inoperative.*

The section does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not, at the time when the recommendation is made, working as a Presidency or Additional Presidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the District Magistrate of the District in which the person concerned is working at the time when the recommendation is made, or the Chief Presidency Magistrate, if the person concerned is working under him.

Sardar Sant Singh instructed by *Ganpat Rai* for Applt.

B. Banerji & N. K. Sen instructed by *P. K. Bose*, for Respt.

JUDGMENT.

Zafrulla Khan J.—The Appellant along with six other persons is being tried before an Additional Presidency Magistrate, Calcutta, on charges of hoarding and profiteering under rule 81 (4) read with rule 122 of the Defence of India Rules. During the course of the trial he applied to the Chief Presidency Magistrate, Calcutta, for transfer of the cases from the file of the trying Magistrate. One of the grounds urged in support of the application for transfer was that the appointment of the Magistrate was irregular and therefore ineffective, as it had not been made in accordance with the conditions prescribed by section 256 of the Constitution Act and that, therefore, the Magistrate had no jurisdiction to try these cases or indeed any case at all. The application was dismissed by the Chief Presidency Magistrate. The appellant thereupon moved the Calcutta High Court in revision with no better result. This appeal was preferred against the order of the Calcutta High Court supported by the requisite certificate under section 205 of the Constitution Act.

The sole question argued before us related to the interpretation and effect of section 256 of the Constitution Act which runs as follows :—

"No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to or the withdrawal of any magisterial powers from, any person save after consultation with the District Magistrate of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be."

It was contended that the appointment of the Additional Presidency Magistrate trying these cases was made without consulting the Chief Presidency Magistrate, and was therefore ineffective and inoperative. In our judgment the section does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not, at the time when the recommendation is made, working as a Presidency or Additional Presidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the District Magistrate of the District in which the person concerned is working at the time when the recommendation is made, or the Chief Presidency Magistrate, if the person concerned is

at that time working under him. In this case the services of the Magistrate concerned were borrowed from another Province, and on these being placed at the disposal of the Bengal Government, he was appointed Additional Presidency Magistrate at Calcutta. In these circumstances we are of the opinion that the consultation prescribed by section 256 should have been made with the District Magistrate of the District in which the Magistrate was working in his own Province at the time when the question of his appointment as Additional Presidency Magistrate, Calcutta, came under consideration. There is nothing on the record to indicate that such consultation did not take place. There is thus no foundation for the contention that the direction contained in section 256 was not complied with.

We are further of the opinion that the direction laid down in section 256 is directory and not mandatory, and that non compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative. It seems, to us that any other view would lead in many cases to results which could not have been intended by Parliament and would entail general inconvenience and injustice to persons who have no control over those entrusted with the duty of making recommendation for the grant of magisterial powers (see *Montreal State Railway Company* v. *Normandin* [1].

A preliminary objection was taken on behalf of the Crown that the appeal was incompetent inasmuch as the order of the High Court appealed against was not a judgment or final order within the meaning of section 205 of the Constitution Act. Reliance was placed, in support of the objection on the observations of Sulaiman, J in *Hori Ram Singh* v. *The Crown* [2] Reference was also made to *Venugopala Reddiar* v. *Krishnaswami Reddiar* [3]. As we have come to conclusion that there is no substance in the appeal on the merits, we do not consider it necessary to deal with the preliminary objection. No other question was sought to be raised before us.

The appeal fails and is dismissed.

—— *Appeal dismissed.*

1. (1917) A.C. 170 ; 174-175
2. (1939) M.W.N 497 ; F.C.R 159
3. (1943) M.W.N. 345 ; F.C.R. 39

FEDERAL COURT

Criminal Appeal No. 3 of 1945.

November 9, 1945.

SIR PATRICK SPENS, C J, SIR S. VARADACHARIAR & SIR MD. ZAFRULLA KHAN, JJ.

Sarjoo Prasad

v.

Emperor (through Bidynandan Singh)

Goverment of India Act (1935)—Sec. 270(1). —Applicability.

As the prohibition contained in S 270(1) of the Constitution Act is against the institution of the suit itself, the applicability of the section must be judged at the earliest stage of institution

The mere fact that the accused proposes to raise a defence of the act having purported to be done in execution of duty would not in itself be sufficient to justify the case being thrown out for want of sanction under S 270(1).

Where the complaint alleged that the accused, a station master, got annoyed at the complainant's request for the issue of tickets resisted his going on the steamer to bring back his people and luggage already loaded, and abused him and on the complainant resenting these, ordered K and other coolies to beat him and he himself assaulted the petitioner with slaps and blows.

Held, *that the acts complained of cannot be regarded as 'purporting to be done' in execution of duty.*

Nageshwar Prasad & Tarakishore Prasad instructed by *Tarachand Brijmohanlal* for Appellant.

Mahab r Prasad (Advocate General, Bihar)& Tarkesewar Nath instructed by *S. P. Varma*, for Respondent.

JUDGMENT.

SIR PATRICK SPENS, C.J. The only question which it is necessary to decide in this appeal is whether the proceedings out of which the appeal arises are "in respect of any act done or purporting to be done in the execution of his duty" by the appellant as a servant of the Crown (Section 270(1) of the Constitution Act).

The appellant was a station master at a steamer station on the O.T. Railway. The complaint alleges that on 25th July 1944, the complainant with his wife and certain others proceeded to the station a short time before the steamer was due to leave, that he went to the booking office to purchase tickets, asking his wife and the rest of the party to wait at the jetty along with the luggage, that the booking clerk declined to issue tickets alleging that it was very near the

time fixed for the steamer's departure and that when he went to the jetty he found that his wife and the other people had already boarded the steamer with the luggage and accordingly he asked the station master to arrange for the issue of the tickets required. It will be convenient, in view of the argument urged before us, to set out the rest of the complaint in full:

" He (the station master) gave a flat refusal and said that he could not do anything in the matter and when your petitioner repeated his request, he got annoyed and asked your petitioner to get out and then your petitioner wanted to go on the steamer to bring back the ladies and the luggage but the accused No. 1 (station master) resisted your petitioner's going on the steamer and showed unsympathetic attitude and furious temper and went to the length of abusing your petitioner calling bad names such as "Badmas," "Tum Kahan Jata Hai" "Steamer per jaoge tab mar khaoge."

" (6) That your petitioner resented this and protested against the uncivil behaviour whereupon accused No. 1 called out a man Khalifa by name and other coolies and ordered them to beat your petitioner and on the order being issued accused No. 2 Khalifa and some coolies began to assault your petitioner and his companions. The accused No. 1 also assaulted your petitioner with slap and gave fists and blows on the body of your petitioner and your petitioner's brother."

After the appellant had been summoned, the Magistrate expressed the view that sanction under section 270(1) of the Constitution Act was necessary for the institution of these proceedings. The complainant applied to the Government of Bihar for sanction; he was informed in reply "that he should seek his remedy in the superior courts if his complaint is dismissed." On production of this order the magistrate discharged the accused, though it is not on record how exactly he interpreted this order.

On application to the Sessions Judge for further enquiry he was of the opinion that no sanction was necessary in the case and he accordingly ordered a further enquiry. The station master carried the matter on revision before the High Court. Agarwala, J. dismissed the petition, holding that Section 270(1) could not be invoked in respect of an offence committed in 1944 because the "relevant date" referred to in that clause must be taken to be the date of Part III of the Act coming into force, viz 1st April, 1937. This appeal has been filed against this order of the learned Judge and the correctness of his interpretation of the expression "relevant date" in its application to a railway servant has been questioned.

It has been contended that a railway servant is not a person "employed about the affairs of Province" but one "employed about the affairs of the Federation" that according to clause (3) of Section 270, "the relevant date", in the applicant's case must be held to be the date of the establishment of the Federation and that therefore the act complained of is one done before the "relevant date." By way of answer to this contention it has been suggested that on a proper reading of clause (1) of Section 270 the benefit of that section can be invoked by servants of the Central Government only when proceedings are instituted *after* the establishment of the Federation, in respect of acts done before the date of the establishment of the Federation. It is unnecestary for the purpose of this case to decide this question because we are of the opinion that the act complained of in this case cannot be held to be one "done or purporting to be done" in the execution of the appellant's duty as a servant of the Crown.

The materials with reference to which the applicability o Section 270 (1) must be considered were indicated in the Judgment of this Court in *Hori Ram Singh* v. *The Crown* [1]. It was pointed out by Sulaiman, J. that as the prohibition was against the institution itself, the applicability of the section must be judged at the earlier stage of institution. The learned Judge then proceeded to say "if the prosecution case as disclosed by the complaint or police report, as the case may be, shows that the act purported to be done in execution of duty, the proceedings must be dropped But if the prosecution case does not involve this, the case cannot be thrown out on the preliminary ground of want of consent." [*Page* 179 : *See also pp.* 184 *and* 185] Applying this test, we are unable to hold that on the allegations in the complaint, which we have above set, out, the acts complained of can be regarded even as one "purporting to be done" by the appellant in execution of his duty.

Counsel for the appellant drew our attention to Sections 68 and 113-A of Indian Railways Act and to Chapter IV, rule 2, of the Bengal and North-western Railway Traffic Manual and contended that the Station Master believed that he was exercising the powers and duties imposed upon him by these provisions and that he was entitled to the protection afforded by Section 270 (1) even if he erroneously thought that these provisions justified his conduct. We do not propose to discuss the bearing of these provisions on the case. As

1. [1939] M. W. N. 497 ; 1939 F. C. R. 159.

observed by Sulaiman, J. in the judgment already referred to, "the mere fact that accused proposes to raise a defence of the act having purported to be done in execution of duty would not in itself be sufficient to justify the case being thrown out for want of sanction under Section 270 (1). Counsel for the appellant further contended that reading the complaint in the light of the statement made by the complainant before the Magistrate we must hold that the complaint itself discloses that the act purported to be done in execution of duty. We are not satisfied that this is so. On the language of paragraph (6) of the complaint set out *supra* there is no room for any suggestion of ambiguity as to the case alleged against the appellant.

The appeal fails and is dimissed.

—— *Appeal dismissed*

Criminal Revision Case No. 835 of 1945.
(Criminal Revision Petition No. 779 of 1945)
November 23, 1945.
KUPPUSWAMI AYYAR, J.
D. Narasimha Aiyar
v.
Emperor

Traffic Rules, R. 39 (1) (b)—Offence under.

A person who is sitting on the carrier of a cycle, through he does not propel the wheels by moving the pedals, 'rides the cycle' and is guilty of an offence under R. 39 (1) (b), Traffic Rules.

Petition under Sections, 425 and 439, of the Code of Criminal Procedure 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional 1st Class Magistrate of Ariyalur dated 27-6-1945 and made in C. A. No. 27 of 1945 preferred against the order of the Court of the Stationary Second Class Sub-Magistrate, Jayankondan dated 5-5-1945 in C. C. No. 262 of 1945.

G. Gopalaswami for Petr.
Public Prosecutor (V.L. Ethiraj), for Crown.

ORDER

Rule 39 (1) (b) of the Traffic Rules runs thus:

"No person shall ride a cycle on any road in any other manner than on the saddle."

Admittedly, the petitioner was riding not on the saddle but on the carrier behind the saddle and above the wheel. He is therefore guilty of the offence with which he has been charged.

What is contended is that what was intended to be prohibited was the propulsion of the wheels by moving the pedal without sitting on the saddle. That also could be said to be prohibited as it is riding in any other manner but by sitting in any place without propelling the wheels; etymologically, it will be correct to say that the man who is sitting on the carrier and is carried on the cycle, is riding the cycle, But then he will not be riding it sitting on the saddle.

The petitioner was rightly convicted and the sentence cannot be said to be excessive. The petition is dismissed.

N.T.R. *Petition dismissed.*

PRIVY COUNCIL
(Appeal from Oudh)
October 17, 1945
LORD THANKERTON, LORD GODDARD & SIR JOHN BEAUMONT
Brij Bhushan Singh
v.
Emperor

Criminal Procedure Code (V of 1898) S. 164—Statement under—Use of.

A statement under S. 164, Cr. P. C. can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of court under S. 164 is true.

Where the Court discussed in great detail the statements under S. 164 and gave reasons accepting the facts or most of the facts, deposed to in those statements, in preference to the evidence given by the witnesses in court,

Held, *that this was an improper use of the statements.*

Appeal to His Majesty in Council was admitted, because it appeared statements under s. 164 were used as substantive evidence.

D. N. Pritt. K.C. & R. K. Handoo, for Applt.
C. D. Roberts, K.C., H. Wallach & B. J. Mckenna, for Respt.

JUDGMENT

Sir John Beaumont. This is an appeal by special leave against a judgment and order of the Chief Court of Oudh at Lucknow dated the 5th May, 1944, varying as to sentence only an order of the Sessions Judge at Lucknow dated the 10th January, 1944, by which the appellant was found guilty of the offence of culpable homicide not amounting to murder of one Bilasia, his wife's *bandi* maidservant, under paragraph 2 of section 304 of the Indian Penal Code and was sentenced to six years' rigorous imprisonment, a sentence which, by the said variation, was reduced to a period of

6. (1937) M.W.N. 81

about four months which the appellant had already served.

At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal should be allowed and that they would give their reasons later. This they now proceed to do.

The original charge against the appellant was under section 302 of the said Code for the murder of Bilasia, but he was committed for trial on the charge of culpable homicide not amounting to murder under section 304. In the Court of Sessions, however, the charge was altered to one of murder under sec. 302, and, although the eventual conviction was under section 304, it was on the charge of murder that the appellant was tried by the Sessions Judge sitting with five assessors.

At the same time, and in relation to the same alleged offence, the appellant separately, and four other persons, who were accused 2-5, jointly, were charged with the offence of causing evidence of the commission of the said offence of murder to disappear, to wit, with the destruction or disposal of the body of Bilasia, knowing or having reason to believe that the offence had been committed, and with the intention of screening the offender from legal punishment, an offence punishable under section 201 of the said Code.

No objection seems to have been taken to the trial of accused 2-5 jointly with the appellant, although it was not suggested that they had taken any part in, or had any knowledge of, the alleged murder by the appellant. However, as these accused were acquitted, this point need not be discussed.

Under the provisions of the Criminal Procedure Code and certain regulations of the local government, a charge under section 302 of the Penal Code is triable by a judge with assessors, and a charge under section 201 is triable by a judge with a jury. At the said trial the same five gentlemen acted as assessors on the main charge and as jurors on the minor charge.

The prosecution case was that on the 26th May, 1943 in the appellant's house at Lucknow Bilasia had been found in compromising circumstances with the appellant's bearer, one Samuel, and that on this fact being reported to the appellant on his return from his office at about 7-30 p.m. he gave Bilasia a beating. The prosecution suggested that it was a very severe beating and that it reduced the girl to the point of death. At about 8-30 p.m. the appellant went out to dinner with a friend, and returned at about midnight and the prosecution alleged that by that time Bilasia had died. Thereupon, that is shortly after midnight, the appellant, with his wife and his chauffeur Mahabir, drove in the appellant's car some 60 miles to the house at Ramgarh Gularia of Bhanwar Singh, whose wife, a sister of the appellant's wife, had a *bandi* maidservant named Basanti who was a cousin of Bilasia. The prosecution alleged that the dead body of Bilasia was in the boot of the car, and that the object of the journey was to dispose of such body. The prosecution alleged that a mile or two before reaching Ramgarh Gularia the appellant's car had a puncture, and that certain villagers who were passing in a bullock-cart took the appellant's party up to the house of Bhanwar Singh; that when the party reached the house, Bhanwar Singh, who was accused 2, sent his servant, who was accused 3, and two Pasis who were accused 4 and 5 with Mahabir to the appellant's car; that they removed the body of Bilasia from the car and concealed it and subsequently dismembered it and scattered the bones in the jungle, and later pointed out such bones to the police.

The appellant admitted that he gave Bilasia a beating on the evening of the 26th May but alleged that it was a light beating mainly on the hands and arms, though he gave her one blow on the back as she was running away. He said that he was very angry about Bilasia's conduct since she had been guilty of similar conduct on previous occasions, and that he insisted that his wife should get rid of her at once. He alleged that on his return from his dinner party at about midnight he was very much annoyed to find that Bilasia was still in the house; he refused to have her any longer under his roof and insisted that he and his wife and chauffeur should take her at once to the house of Bhanwar Singh, where she could be handed over to the care of Basanti. On this part of the case the real point at issue between the prosecution and the defence is whether it was Bilasia herself who, or Bilasia's dead body which was taken in the car from Lucknow.

The appellant admitted the puncture a mile or two short of Bhanwar Singh's house and said that he and his wife and Bilasia walked the rest of the way to the house, leaving the chauffeur to repair the puncture; that his wife and Bilasia remained at Bhanwar Singh's house, but the appellant himself returned to Lucknow in his car as soon as the puncture was mended.

It is common ground that when the police visited the house of Bhanwar Singh on the 28th May, Bilasia had disappeared, and has not been heard of since. The appellant's story is that she had gone out to the jungle to answer a call of nature and had not returned.

At the trial the jury returned a verdict of not guilty in respect of all the accused upon the charge under section 201, and as assessors they expressed the view that no offence was proved against the appellant under section 302 or section 304. The Sessions Judge did not agree with the verdict of the jury and made a reference to the Chief Court of Oudh under section 307 of the Criminal Procedure Code. On the major charge he convicted the appellant under section 304 as already stated.

The learned Judge in a very full judgment discussed the whole of the evidence in detail. In regard to the beating of Bilasia he summed up his conclusions in these terms: "This concludes the evidence of the prosecution witnesses regarding the beating. It certainly does not prove that the beating was a severe one, or that Bilasia died as a result of this beating, but I do feel that the manner in which the two ayahs have given their evidence, particularly Mst. Haliman, shows that they are withholding the truth, and the fact must be borne in mind when considering the prosecution evidence as a whole." At the end of his judgment, however, he expressed the view that the appellant lost his self-control and beat the girl severely with a stick of substantial size. He concluded in these terms: "Everyone is presumed to know the natural consequences of his actions and the knowledge which I impute to Mr. Singh is the knowledge that the excessive beating which he gave to Bilasia was likely to cause her death. I am not prepared to hold that the offence committed by him is of a lesser nature as there is no reason to assume that Bilasia's death was due to some accidental cause which Mr. Singh could not have anticipated, such as the rupture of a diseased organ. Bilasia, so far as the evidence discloses, was a healthy girl and I do not think that there are any good grounds for holding that her death was occasioned by some physical abnormality, the existence of which was not known to Mr. Singh. The view I take is that Mr. Singh beat her recklessly and violently knowing that his blows were likely to cause her death. I am therefore of the opinion that he is guilty of the offence punishable under the second part of section 304, Indian Penal Code."

The reason why the learned Judge changed his view as to the severity of the beating established by the prosecution evidence is not clear. He could not act upon evidence which was not given, however much he may have felt that it ought to have been given. Their Lordships may observe that the theory which the learned Judge rejected that the girl may have died from an internal injury caused by the beating which manifested itself later in the evening at least afforded a rational explanation of the conduct attributed to the appellant. It is almost inconceivable that if the appellant, an educated man, a member of the Indian Civil Service, had beaten the girl to the point of death, he would have gone out for the evening without taking any steps to ensure that she received medical attention. and that his wife would have concurred in such procedure. Apart from consideration of humanity, the appellant must have realised that the death of the girl would place him in a very serious position.

With regard to the evidence as to the disposal of the body the learned Sessions Judge acted, as he was entitled to do, upon his own view of the evidence which the jury had rejected on the lesser charge. He accepted most of the evidence of the villagers who were said to have met the party when the tyre punctured and considered that such evidence established that Bilasia was not with the party at that time, a finding which destroyed much of the defence case; though it is to be noticed that no witness spoke of having seen the dead body of Bilasia. With regard to the production of the bones the learned Judge accepted the evidence of their having been pointed out by accused 3–5 and held that the bones might be the bones of Bilasia though he did not hold this to have been definitely proved.

On appeal the Chief Court of Oudh rejected the reference under section 307 holding that there was evidence on which the jury were entitled to reach the conclusion they did, and that their verdict was not perverse. The Chief Court, however, went further than this and themselves considered the evidence, as they were right in doing since the evidence as to the disposal of the body might be relevant on the charge under section 304. In the result they expressed the view that the jury's appreciation of the evidence was correct; they rejected the whole of the prosecution evidence as to the disposal of the body, and held that the bones produced were not those of Bilasia.

The Court then considered the evidence as to the killing of Bilasia at Lucknow and held

that it was proved that the appellant gave such a beating to Bilasia that it ultimately resulted in her death, and that her dead body was removed in the car though the method of its disposal was not proved. In reaching this conclusion, however the Chief Court used statements made by the Ayah Haliman and the chauffeur Mahabir under section 164 of the Criminal Procedure Code as substantive evidence of the truth of the facts stated. It is true that in their judgment the learned Judges say : "We may add that the statements under section 164 cannot be and have not been used as substantive pieces of evidence but only for such purposes as the law permits." A perusal, however, of the whole of the judgment makes it apparent, in their Lordships' view, that the statements were used as substantive evidence and it was for this reason that the appeal to His Majesty in Council was admitted. The learned Judges discussed in great detail the statements made by Haliman and Mahabir under section 164 and gave reasons for accepting the facts, or most of the facts, deposed to in those statements, in preference to the evidence given by the witnesses in Court, which in no way helped the prosecution. This was an improper use of such statements. A statement under section 164 can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under section 164 is true.

Mr. Roberts for the Crown did not attempt to justify the use made by the Chief Court of the statements under section 164. His contention was that two Courts in India have convicted the appellant ; that there was evidence to justify such conviction, and that no injustice would be done by upholding it, and that there was no ground upon which this Board should interfere. This argument as at first presented ignored the fact that the two Courts in India differed materially in their view of much of the evidence, and ultimately Mr. Roberts was constrained to invite the Board to accept the appreciation of the evidence by the Sessions Judge in preference to that by the Chief Court. The story which the Chief Court rejected, namely, that the body of Bilasia was placed in the appellant's car and taken as far as the place where the puncture occurred, that the whole party proceeded from that place to the house of Bhanwar Singh leaving the corpse in the unattended car on a frequented road, that Bhanwar Singh without having enjoyed any previous opportunity of considering the matter at once ordered his servants to accompany Mahabir to the car and dispose of the body, and that the servants performed this task without apparently any regard to the serious consequences to themselves which might ensure, is not one calculated to carry conviction upon its own intrinsic merits. As a mere matter of probability it would be reasonable to suppose that the dead body, if there was one, was disposed of by the appellant and Mahabir before arriving at Ramgarh Gularia without incurring the risk of introducing outside parties who might prove awkward witnesses ; and that the journey to Ramgarh was continued in order to arrange with Bhanwar Singh a suitable story in case inquiries for Bilasia were instituted. It is clear that their Lordships could not reject the view which the Chief Court took of the evidence without themselves considering the evidence in detail. This is a course which the Board normally refuses to adopt in a criminal appeal, and their Lordships see no reason in this case for departing from their usual practice of accepting the appreciation of evidence reached by the Court from which the appeal is brought.

Upon the finding of the Chief Court that the evidence as to the disposal of the body was unreliable and that the bones produced were not those of Bilasia, the case must rest, as the Chief Court recognized, on the Lucknow evidence as to the beating. On this view of the matter their Lordships find that the prosecution case is not proved. There is no evidence that Bilasia was beaten very severely ; no one saw her in a state of collapse, and no one saw her dead body, and there is no evidence sufficient to justify a finding that Bilasia is dead. It is true that both the Courts in India disbelieved the reason given by the appellant to explain the midnight motor-car journey, holding that it was untrue and, indeed absurd, to suggest that such a journey was undertaken because the appellant could not face passing another night under the same roof as Bilasia ; and their Lordships entirely concur in this view. The fact, that a long motor-car journey was undertaken in the middle of the night, and that a false reason was given in explanation, raises a suspicion that the object of the journey may have been to dispose of the dead body of Bilasia, and that suspicion is much strengthened by finding that from the time when the motor-car left the appellant's house, Bilasia was never seen alive by any independ-

ent witness, and that admittedly she had disappeared the next day. The appellant has only himself to blame for much of the course which the case has taken. But suspicion is not proof. It is impossible to say that the only legitimate inference to be drawn from this motor-car journey and the disappearance of Bilasia, is that the appellant killed Bilasia. Their Lordships are of opinion that the appeal must be allowed and the conviction of the appellant quashed and they have humbly advised His Majesty accordingly.

——— *Appeal allowed.*

PRIVY COUNCIL

(Appeal from Somaliland)

July 31, 1945

LORD PORTER, LORD SIMONDS & LORD GODDARD

Mohamed Sugal Esa Mamasan Rer Alalah

v.

The King

Oaths Act (X of 1873)—Evidence Act (I of 1872) S. 118—Evidence of child not on oath —Admissibility-Corroboration.

S. 13, Oaths Act applies to a case where the court accepts the evidence of a child to whom oath is not administered on the ground that the witness does not understand its nature. S. 13 is unqualified in its terms and there is nothing to suggest that is to apply only where the omission to administer the oath occurs per incuriam.

In India there is no provision requiring corroboration of the unsworn evidence of a child and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration, unless required by statute goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

A. P. Pullan, for Applt.

Frank Grahan, for Respt.

JUDGMENT

Lord Goddard. Their Lordships now give their reasons for the advice they humbly tendered to His Majesty on July 31st that this Appeal should be dismissed.

The appellant together with his brother Elmi was charged on July 22nd, 1944, before the Protectorate Court of Somaliland with the murder of his half-brother Abdillahi on or about May 17th, 1942. The Judge of the Court convicted the appellant and sentenced him to death, and acquitted Elmi. The conviction and sentence were confirmed on appeal by the Military Governor sitting as Judge of the Protectorate Court on the appellate side and the appellant subsequently obtained special leave to appeal to His Majesty in Council. The ground upon which special leave was given was that the Court had admitted and acted upon the unsworn evidence of a girl of 10 or 11 years of age whom the Judge found was competent to testify but whom he did not consider was able to understand the nature of an oath. It was conceded by the Crown that if her evidence was inadmissible, not being given on oath, there was not sufficient evidence to warrant a conviction. In substance the only question for decision is whether the law in force in the Protectorate permits the Court to receive evidence from a person who does not understand the nature of an oath but is otherwise competent to testify, as understanding the questions put and being able to give rational answers. It is only necessary to give a very brief statement of the facts as the whole question is one of law.

There had been a dispute between the appellant and the deceased about a she-camel, which had been decided on May 16th, 1942, in favour of the latter by a native tribunal, and the appellant had been heard to utter threats against him. On the next day the deceased was murdered, and his body was found near the camp in which both he and the appellant were living. There was evidence that the appellant was seen at the camp just after the body was found and that immediately afterwards he and his brother disappeared and made no attempt to trace the murderer of their half-brother and so become entitled to blood-money. They did not return to the camp for about six months and were arrested in consequence of some other dispute about property and charged with the murder rather more than a year after it had been committed. The witness whose evidence is in question in this appeal is a girl named Sudio Mohamed, who at the time of the murder was not more than 10 years old and she was tendered by the Crown as an eyewitness of the crime and as having given the alarm at the camp which led to the finding of the body. It is stated by the trial judge that she appears to be intelligent for her age and that she gave her answers frankly and without hesitation.

By paragraph 16 of the Somaliland Order in Council, 1929, the Indian Evidence Act, 1872, and the Indian Oaths Act, 1873, are expressly applied to Somaliland. Section 118 of the Evidence Act is in these terms:—

"118 All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or

from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

The material sections of the Oaths Act are sections 5, 6 and 13 which provided as follows:—

"5. Oaths or affirmations shall be made by the following persons:—All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence.

"6. Where the witness, interpreter or juror is a Hindu or Muhammadan ,or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath."

"13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

In India the question has more than once arisen whether the omission to take an oath referred to in section 13 of the Oaths Act applies to a case where the Court deliberately refrains from administering the oath to a witness, or only to cases where the omission is due to some accident or negligence, and opinion on the subject has not been unanimous. It is unnecessary to set out all the cases but their Lordships will refer to three of them.

Soon after the passing of the Act the question came before the High Court of Bengal in *R.* v. *Siva Bhogta* [1] where a majority of the Full Bench, Jackson J, dissenting, held that the section being unqualified in terms did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature. On the other hand in Allahabad, Mahmood, J. in an elaborate judgment refused to follow that case, and preferred the view of Jackson J. that in such circumstances the evidence was inadmissible, *R.* v. *Maru* [2]. The other case to which their Lordships would refer is *Ram Samujh* v. *King-Emperor* [3], in which an instructive judgment was given by Greeven, A.J.C. agreeing with that of the Bengal High Court.

1. 14 Beng. L.R. 294
2. (1888) I.L R. 10 All. 207
3. (1907) 10 Oudh Cases 337

In their Lordships' opinion the decision of the Bengal High Court and in the case in 10 Oudh are right. Section 13 of the Oaths Act is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. If that had been the intention of the Legislature it would have been simple to insert words in the section to that effect. No doubt, however, it was recognised that in some backward communities there may well be persons capable of understanding the necessity and duty of speaking the truth without appreciating the religious or moral obligations imposed by taking an oath. It is not to be supposed that any Judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness. It may be observed that this question can no longer arise in India because in 1939 the Indian Legislature passed the Indian Oaths (Amendment) Act (Act XXXIX of 1939), which settles the law in accordance with the Bengal and Oudh decisions referred to above. A question was raised in this Appeal as to whether that Act applies to Somaliland but in view of the opinion which their Lordships have formed as to the true construction of section 13 of the unamended Act they do not find it necessary to decide it and accordingly they express no opinion as to whether the amending Act is part of the law of Somaliland.

It was also submitted on behalf of the appellant that assuming the unsworn evidence was admissible the Court could not act upon it unless it was corroborated. In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law. In a careful and satisfactory judgment the Judge of the Protectorate Court shows that he was fully alive to this rule and that he applied it and their Lordships are in agreement with him as to the matters he took

into account as corroborative of the girl's evidence. There is no fault to be found with the judgments of either Court and their Lordships have humbly so advised His Majesty.

—— *Appeal dismissed.*

PRIVY COUNCIL

(Appeal from Lahore)

October 30, 1945

LORD THANKERTON, LORD GODDARD & SIR JOHN BEAUMONT

Mamand & others

v.

Emperor

Criminal Procedure Code (V of 1898*) s.* 164 *—Statement under—Use of—Penal Code (XLV of* 1860*), s.* 34*—Conviction under.*

The statement under s. 164*, Cr. P. C. is not substantive evidence of the facts sta.ed. The statement could be used to discredit the evidence of the witness given in court, but not for any other pu:pose.*

Where in view of the statement under s. 164 *it appears that the witness had been won over by the defence, his evidence must be entirely ignored.*

The three eye witnesses deposed that they heard a commotion at the dera of one G; that they saw the second and third appellants beating with sticks the deceased, who was on the ground; and they saw the first appellant grappling with G. There was evidence to show that the first appellant had strong grounds for entertaining feelings of enmity against the deceased, that the second appellant was a younger brother of the first appellant that the third appellant was their tenant and that all the three accused lived at the dera of the first appellant. There was also the fact that the three accused ran away together; also there was no evidence of enmity between G and the deceased.

Held *that the evidence afforded material to hold that the first appellant was grappling with G so that he might not rescue the deceased from the clutches of the second and third appellants, and this justified the inference that the murder was committed in furtherance of the common intention of all the appellants, within s.* 34 *read with s.* 302*, Penal Code.*

A. G. P. Pullan & J. M. Jayakar, for Applts.

I. M. Pringle, K. C. for Respt.

JUDGMENT

Sir John Beaumont : This is an appeal against a judgment of the High Court of Judicature at Lahore dismissing an appeal by the three appellants against a judgment of the Sessions Judge, Shahpur District, at Sargodha, convicting the appellants of the murder of one Naman and sentencing the first and third appellants to death and the second appellant to transportation for life. The High Court confirmed the said death sentences. At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeals should be dismissed, and they now give their reasons for such advice.

The learned Judges of the High Court accepted the evidence of three eye-witnesses Raja Sarwar Khan (P.W. 11), Barket (P.W. 13) and Samand (P.W. 15) as to the manner in which the murder was carried out. The story of these three witnesses, which was in substantial agreement, was that they heard a commotion at the dera of one Gahra, that they saw the second and third appellants beating with sticks Naman who was on the ground, and they saw the first appellant, Mamand grappling with Gahra. The three witnesses ran towards the disturbance, Raja Sarwar Khan and Samand shouting that the assailants should be caught. Before the witnesses reached the spot the three appellants ran away and were chased for some distance by the witnesses and two other men who had come up. Barkat says that the second and third appellants got the first appellant released from Gahra. In the Sessions Court Gahra gave evidence that the murder was committed, not by the accused, but by five other men; but in a statement which he had made before a magistrate under section 164 of the Code of Criminal Procedure he had named the appellants as the assailants and attributed to the first appellant the first blow given to Naman. The learned Sessions Judge fell into an error, not uncommon in Criminal Courts in India, of treating the statement made under section 164 as substantive evidence of the facts stated. The statement could be used to discredit the evidence of Gahra given in Court, but not for any other purpose. In the High Court the learned Judges considered that, in view of the statement under section 164, Gahra had been won over by the defence, and that his evidence must be entirely ignored. This was the correct attitude. The evidence of the eye-witnesses, which was consistent with the medical evidence as to the cause of death, justified the finding of the High Court that the second and third appellants were guilty of murder and the only point which really arises on this appeal is whether there was evidence to justify the

conviction of the first appellant under section 302 read with section 34 of the Indian Penal Code.

Section 34 is in these terms :—

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

If the evidence of the three eye-witnesses stood alone, it could not be said to establish that the first appellant, who was merely grappling with Gahra, had formed a common intention with the second and third appellants to murder Naman. But the evidence did not stand alone. There was evidence on the record which the High Court accepted, that the first appellant had strong grounds for entertaining feelings of enmity against Naman, grounds based on the relations of the first appellant and Naman with a Muslim girl named Fatima or Phapho; that the second appellant, a boy of 15, was a younger brother of the first appellant, that the third appellant was their tenant and that all three accused live at the dera of the first appellant. There was also the fact deposed to by the eye-witnesses that after the assault the three accused ran away together; also there was no evidence of enmity between Gahra and Naman. In their Lordships' opinion the evidence afforded ample material upon which the learned Judges of the High Court could hold, as they did, that the first appellant was grappling with Gahra so that he might not rescue Naman from the clutches of the second and third appellants, and this justified the inference that the murder was committed in furtherance of the common intention of all the appellants. There is therefore no reason for interfering with the convictions.

FULL BENCH

Referred Case No. 34 of 1945

December 3, 1945

SIR LIONEL LEACH, C.J., LAKSHMANA RAO & KUPPUSWAMI AYYAR, JJ.

In the matter of a Pleader, Coonoor.

Legal Practitioners Act (XVII of 1879*) S.* 13 *(f) —Conviction for defamation—Effect.*

Where a legal practitioner said that a sub-inspector of police had received bribe and the practitioner was convicted for defamation.

Held, *that the offence which the practitioner committed involved moral turpitude, but not such a degree of moral turpitude as to warrant his suspension from practice. The practitioner was reprimanded.*

Advocate-General (*K. Rajah Iyer*) for Crown.

K. P. Mahadeva Iyer, for Respt. (Pleader).

JUDGMENT

(Sir Lionel Leach, C.J.)

The respondent is a pleader practising at Coonoor. On the 6th February 1944, a Badaga made a complaint to the Kotagiri Police against another Badaga in respect of an offence alleged to have been committed within the meaning of section 324 of the Indian Penal Code. The case was investigated by the Sub-Inspector of Police who referred it as undetectable. The complainant then engaged the respondent to file a complaint before the Sub-Magistrate of Coonoor. While the respondent was waiting in the Court for the Magistrate to take up the case, the Additional Assistant Public Prosecutor asked him why he had come to Court. The respondent said that the Sub-Inspector had taken money from the other side and referred the case as undetectable and that the Sub-Inspector would have referred it as false if he had been paid an extra Rs. 50. This statement was, of course, defamatory of the Sub-Inspector and it resulted in a prosecution for defamation. The respondent was fined by the trial Court Rs. 1,000, and ordered to undergo six months' rigorous imprisonment in default of payment. On appeal the fine was reduced to Rs. 200 with the alternative of one month's simple imprisonment.

In these circumstances, the High Court directed the District Judge of Coimbatore to enquire into the matter under section 13 of the Legal Practitioners' Act. The respondent was called upon to file a written statement and he did so, whereupon a charge for professional misconduct was framed against him. The learned District Judge found him guilty of the charge and in his report to this Court has suggested that the degree of moral turpitude involved warrants the suspension of his sanad, not permanently, but for a period.

The Privy Council in *Advocate-General of Bombay v. Phiroz Rustomji* [1] held that the conviction of an advocate or a pleader of a criminal offence is evidence of misconduct within the meaning of section 10 of the Bar Councils Act and it is for the Court to consider whether the disciplinary action called for should be in the nature of a reprimand, suspension or removal from practice. The offence which the respondent committed certainly does involve moral turpitude. He is a member of the legal profession and it was wrong of him to defame the Sub-Inspector in the way he did. At the same time, we consider that his action does not involve such a degree of moral

1. (1935) M.W.N. 913 : I.L.R. 59 Bom. 676 P.C.

turpitude as to warrant the Court imposing the severe penalty of suspension from practice. We think that the case may be dismissed with a reprimand.

N T.R. —

Criminal Revision Case No. 503 of 1945

Criminal Revision Petition No. 463 of 1945

November 29, 1945

KUPPUSWAMI AYYAR, J.

JESIAH DECRUZ

v.

EMPEROR

Defence of India Rules 1939, *R.* 90-*B Proviso —Complaint under—Who can file—Sea Customs Act* (*VIII of* 1878), *S. 3* (*c*).

A complaint of an offence under R. 90-*B, Defence of India Rules is validly made by a person who answers to the description of 'customs collector' as defined in S.* 3 (*c*) *of the Sea Customs Act, even though he is not the person entitled to assess the penalty leviable in respect of this partcular transaction under the Sea Customs Act.*

Petition under Section 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate of Ramnad dated 20-6-1945 and made in C.C. No. 79 of 1948.

K. S. Champakesa Iyengar & K. C. Srinivasan, for Petr.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

This petition arises out of a prosecution by the Sea Customs Department in respect of an offence punishable under rule 90-B of the Defence of India Rules. The prosecution case was that gold was exported out of India and thereby the accused committed an offence punishable under rule 90-B. It was made an offence only under the Defence of India Rules and Rule 90-B, as amended, has a proviso, which runs thus :—

"Provided that where in respect of any contravention of this rule the Customs Collector is of opinion that the penalties provided in the said Act are inadequate, he may make a complaint to a Magistrate having jurisdiction;......"

It is argued that in this case the person who filed the complaint is not the proper person who can file the complaint as per that proviso It is admitted that the complaint was filed by a person who answers to the description "Customs Collector" as defined in Section 3 (c) of the Sea Customs Act. But what is urged is that the person who signed the complaint is not the person who can decide the case if a penalty is to be levied under the Sea Customs Act in respect of the gold said to have been exported in this case, that the person who filed the complaint though he satisfied the description of a "Customs Collector" according to S. 3 (c) of the Sea Customs Act was not the person who is entitled to assess the penalty leviable in respect of this particular transaction under the Sea Customs Act. This is a case in which the prosecution desires a heavier sentence to be imposed and for deciding what the punishment is that has to be imposed in this case it is not necessary that the person who has to decide it should have the power to levy the penalty. The maximum penalty leviable under the Act is known and, if such penalty is not adequate in the opinion of the person who is empowered to prosecute, it will be open to him without having the power to levy the penalty to decide the point and file the complaint, and that is what has been done in this case. I see no reason to interfere I accordingly dismiss this petition.

N.T.R. — *Petition dismissed.*

PRIVY COUNCIL

(Appeal From Oudh.)

November 20, 1945

VISCOUNT SIMON, LORD THANKERTON & SIR JOHN BEAUMOUNT.

BHUP LAL & others

v.

EMPEROR

Criminal Procedure Code (*V of* 1898), *Ss.* 216 & 291—*Defence witnesses for sessions trial —Summoning of.*

A witness whom the defence wished to summon was properly included in the list of witnesses, and after the date of the trial had been fixed by the Sessions Court was properly served by a summons issued by the committing magistrate. The time was too short for the witness to appear at the time and date mentioned in the summons. It happened the trial was postponed and the Court asked the defence to let the witness know of this. But the defence dropped the witness.

Held *that the committing magistrate was completely* functus officio, *and in the circumstances the sessions court also was not in fault.*

Where a witness is not on the defence's list at all, there is no right in the defence to have him brought before the court. But the defence could apply under S. 540 *Cr. P. C. to the Sessions Judge.*

S.P. Khambatta & H. J. Umrigar, for Applt.

B. J. M. Mckenna, for Respt.

JUDGMENT

VISCOUNT SIMON: This is an appeal, by way of special leave to appeal from the judgment of the Chief Court of Oudh, at Lucknow, comfirming the conviction of murder and the sentence of death passed upon the three appellants. Special leave was given in order that, in the light of fuller information, the Board might hear the argument which has been very clearly and candidly advanced by Mr. Khambatta this morning, to the effect that there was some irregularity in the proceedings which would constitute a grave miscarriage of justice unless the appeal were allowed.

There are two proposed witnesses for the defence named in the case. As regards Bhagwan Dass, he was properly included in the list of witnesses whom the defence wished to summon and, after the date of the trial had been fixed by the Sessions Court for 1st August to 3rd August, the last of those days being allotted in advance for the defence Bhagwan Dass was properly served by a summons issued by the committing magistrate to appear on the 3rd August. However, the summons did not reach this gentleman's hands, at his residence some fifty miles off, until the afternoon of the 2nd August owing to his having been away when the effort was first made to serve him. He at once communicated by telegraph to the Sessions Court, informing the Court that he had only just been served and that the time was too short, especially as there was no vehicle available, to enable him to appear, as the summons called upon him to do, at 10 a. m. on the 3rd August. The next morning that fact was mentioned by the Court when the case was being dealt with, and we must proceed on the basis, which everybody accepts, that the time was too short for Bhagwan Dass to appear at the time and date mentioned in the summons.

As it happened, the trial of the case was postponed until the 7th August—it may very well be not on this account, but because of some arrangement already made. That being so, the practical thing to do was to let Mr. Bhagwan Dass know that it was on the 7th August that he would be needed. The Court asked the defence to let him know this. The defence did not do so; they preferred to drop the witness.

In these circumstances, as it appears to their Lordships, there is nothing whatever to complain about in the case of the witness Bhagwan Dass.

At one time it almost appeared that the point arose under section 216 of the Code of Criminal Procedure, which directs what the committing magistrate has to do in relation to summoning witnesses; but, as has been pointed out during the argument, the committing magistrate had exhausted all his powers and duties under that section, and it is not suggested that the committing magistrate was in any way in fault; he was completely *functus officio* so far as this was concerned. If anybody was in fault, it would be the Sessions Court; but there was not really any fault there. The Court did not proceed high handedly. It was glad, no doubt, that there would be plenty of time for this gentleman to appear, and it gave the defence the opportunity of telling him so.

It does not seem that there is any other ground for complaint as regards that witness.

As regards the other gentleman, Sardar Bahadur, he was not on the defence's list at all. There was no right in the defence to have him brought before the court. That appears to their Lordships to follow from section 291 of the Code of Criminal Procedure. The defence could have applied, if it had thought right to do so, under section 540 of the Code of Criminal Procedure, to the Sessions Judge; but they did not do so.

In these circumstances, it appears to their Lordships that there is no good ground for thinking that there has been a miscarrage of justice in this matter at all. There does not appear even to have been any irregularity.

The consequence is that their Lordships will humbly advise His Majesty that this appeal should be dismissed.

—— *Appeal dismissed*

Criminal Revision Case No. 644 of 1945
(Criminal Revision Petition No. 602 of 1945)
November 9, 1945
KUPPUSWAMI AYYAR, J.

P. LAKSHMIAH
v.
EMPEROL

Motor Vehicles Rules—Rule 220 — Offence under.

Where the driver of a bus stopped the bus ni front of a hotel for 10 or 15 minutes to pick up some passengers, that not being a stopping place.

Held, *he was guilty of an offence under rule 220 of the Motor Vehicles Rules.*

It is not necessary for an offence under rule 220 that delay must be of such a

character as to prevent the men reaching the destination in time. What is made an offence is loitering on the road.

'Loitering' means lingering on the way or hanging about.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Chandragiri dated 30—4—1945 and passed in Criminal Appeal No. 19 of 1945 (C. C. No. 1079 of 1944 Sub Magistrate's Court, Tiruttani).

K. Kalyanasundaram & R. Santanam for Petr.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

What is urged for the petitioner is that the offence under rule 220 of the Motor Vehicles Rules requires that the delay must be of such a character as to prevent the men from reaching the destination in time. That is not what is stated there. It is true a driver is expected to reach the destination in time. But what is made an offence is loitering on the road. According to the Concise Oxford Dictionary 'loitering' means lingering on the way or hanging about. In this case according to the finding of both the Courts, the driver was stopping the bus in front of a hotel so that he might pick up some passengers from there. This is certainly lingering on the way. It is not the petitioner's case that it was a stopping place at which he could stop for the purpose of taking passengers Waiting for the passengers, who had gone to the hotel, for nearly 10 or 15 minutes is certainly lingering on the way and the petitioner is therefore guilty under rule 220. It is certainly annoying to the other passengers in the bus if they are made to wait in front of a hotel like this merely to pick up passengers who are expected to come from the hotel and board the bus. The petitioner was rightly convicted. In the circumstances of the case I should think the punishment is lenient. The petition is dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 473 of 1945.
(Cr. R. P. No. 435 of 1945)
November 8, 1945.

KUPPUSWAMI AYYAR, J.

THE PUBLIC PROSECUTOR MADRAS
v.
PINGALI MALLIKARJANA KOTA PANESWARA RAO.

Criminal Procedure Code (V of 1898)—S. 562 —Conviction under s. 409 I.P.C.—Action under s. 562—Illegal.

Where an accused is convicted under s. 409 I.P.C., the case cannot be dealt with under s. 562 Criminal Procedure Code.

Petition under sections 435 & 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Additional I Class Magistrate of Bandar in C. C. No. 126 of 1944.

Public Prosecutor (V. L. Ethiraj) for Crown.

B S. Ramachandra Rao, for accused.

ORDER

This is a revision petition filed by the Public Prosecutor with regard to the sentence passed by the Additional First Class Magistrate of Bandar in C. C. No. 126 of 1944 on his file. The accused was convicted of an offence punishable under section 409 I.P.C. and found guilty and dealt with under section 562 Cr.P.C. The offence is one punishable with transportation for life and therefore the case could not be dealt with under section 562 Cr.P.C. The sentence therefore is illegal and has to be set aside. Taking into consideration, however the fact that the accused who is only 19 years of age and who was employed in the Rationing Office has not only lost his job but lost all his chances of being employed in Goveenment service in future, and as he also has returned the money, it will be sufficient if he is sentenced to imprisonment till the rising of the court. He is accordingly so sentenced. The sentence will be undergone in the court of the Additional First Class Magistrate of Bundar.

N.T.R.

PRIVY COUNCIL
(Appeal from West Africa)
October 11, 1945

LORD PORTER, LORD GODDARD & SIR JOHN BEAUMONT

KWAKU MENSAH
v.
THE KING

Criminal Procedure Code (V of 1898), S. 297 —Charge of murder—Defence of accident—Charge to jury—Interference by Privy Council—Penal Code, S. 300, Excep. I.

Deceased and his party arrived at the village where the appellant lived with bundles of cloth to be smuggled into foreign territory. An alarm was given and a fight ensued. The theory of the prosecution was the villagers attacked the intruders with the object of stealing their goods, while the defence case was that the deceaeed and his party tried to break into appellant's home. The deceased was being chased and as he was running away, appellant fired a gun and killed him. In the course of the fracas appellant was stabbed, before the shot was fired, and according to the appellant, it was inflicted by the deceased. The appellant and

nine others were charged with murder. The sole defence of the appellant was that he presented a gun with the object of frightening and that it was discharged accidentally. The trial judge directed the jury that only in the event of the appellant's account being accepted could a verdict of manslaughter and not murder be returned against him. The jury found the appellant guilty of murder, but the other nine accused were found by them guilty only of manslaughter. On appeal by the appellant,

Held, (*i*) *that the pointing of the gun at the deceased who was running away was without legal excuse and was an unlawful act and the direction of the judge to the jury was not a misdirection;*

(*ii*) *the fact that the jury found the other accused guilty only of manslaughter did not affect the verdict of murder against the appellant.*

(*iii*) *that as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter, this ought to have been submitted by the Conrt to the jury, and the failure to do so, with the result that the jury were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, was enough to justify the Privy Council entertaining the appeal though this matter was not mentioned in the Courts below, and was not even included in the case for the appellant;*

Though the defence of provocation as reducing the crime to manslaughter was not set up by the defence, if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only on the ground of provocation as well as on any other ground, the judge must put that question to the jury. The reason for the rule is that on an indictment for murder it is open to the jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if the verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the judge must bring it to the attention of the jury because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder, If a man is struck or stabbed while defending himself or his property or while trying to apprehend a thief, it amounts to provocation of the most serious character. Whether in the circumstances the provocation was such as to deprive an ordinary person of self control and whether sufficient time had elapsed to enable control to be regained are questions for the jury.

(*iv*) *that in the circumstances the proper course was to substitute for the jury's verdict one for the lesser offence.*

Sir Alfred Wort & Dingle Foote, for Applts.

Frank Gahan, for the King.

JUDGMENT

Lord Goddard. Their Lordships now give their reasons for the humble advice which they have tendered to His Majesty that this appeal should be allowed and a verdict of manslaughter substituted for that of murder.

The appeal was brought by special leave against a judgment of the West African Court of Appeal dismissing the appellant's appeal against his conviction for the murder of one Abudy Zabrama before Lane, J. and a special jury on 15th May, 1943. It appears that in the early morning of 27th November, 1942, the deceased man with some others of his tribe, the Zabrama, arrived at the village of Kajakron, where the appellant lived, carrying bundles of cloth which they were intending to smuggle into French territory. According to the witnesses for the prosecution they reached the village when it was light, either just before or just after daybreak, while according to the defence they arrived in the dark when the villagers were asleep. An alarm was given by someone, and there were cries of "thief" and a fight ensued. The theory of the prosecution was that the villagers attacked the Zabrama with the object of stealing the goods they were carrying. On the other hand the case for the defence was that the incident started because the tribesmen, or some of them including the deceased, entered the compound of the appellant and tried to break into his home. However the fracas started there seems to be no doubt that in the course of the fight the appellant was stabbed, receiving a wound some four inches long on his hip, and according to his evidence it was inflicted by the deceased. The Zabrama, being outnumbered, made off to the Mohammedan part of the village, the Zongo. The deceased, who was being chased by the appellant among others, entered a house and was followed by some of the villagers, still calling out "thief". The deceas-

ed ran out of the house and as he was running away the appellant fired a gun and killed him.

The appellant and nine others of the village were charged with murder, the appellant as a principal in the first degree and the others as abettors. The sole defence set up at the trial on the part of the appellant was that he presented the gun with the object of frightening the deceased and inducing him to surrender. The learned judge in the course of his summing up directed the jury that there were three possible verdicts that they could return, murder, manslaughter and acquittal, and in his opinion no verdict of manslaughter could be entered unless the jury accepted the appellant's own account as to how he shot the deceased. He further directed them that if they did accept that account the appellant would be guilty at least of manslaughter as pointing a gun at the deceased as he was running away was an unlawful act. The jury found the appellant guilty of murder, but the other nine accused were found by them guilty only of manslaughter. On appeal, the West Afrcan Court of Appeal dismissed the appeal of the present appellant, holding that though in their opinion there was a misdirection in saying that on the appellant's own evidence he was at least guilty of manslaughter, a matter with which their Lordships deal hereafter, the jury must have rejected his evidence as was shown by their returning a verdict of murder. With regard to the remaining accused they quashed the conviction on the ground that the jury should have been directed that in their case the only possible verdicts were murder or acquittal, The case of these other nine accused, is of course not before their Lordships.

The first submission on behalf of the appellant was that the Court which heard the appeal was not properly constituted in that Mr. Quashie Idun, who sat as an acting judge had not been properly appointed in accordance with law. The West African Court of Appeal is constituted and has its powers conferred by various Orders in Council now consolidated in the West African Court of Appeal Orders, 1928–1935, being No. II of 1935. By sec. 2 the expression "Judge" includes any person for the time being performing the duties of such office. By sec. 5 the Judges of the Court are the Judges of the Supreme Courts of the Gold Coast and Nigeria and such other colonies to which the Order is applied, and by sec. 9 there must be at least 3 Judges to form a Court. The Supreme Court of the Gold Coast is constituted by Ordinance No. 7 of 1935 which provides for the appointment of a Chief Justice and as many Puisue Judges as the Governor may from time to time appoint by letters patent. By sec. 9 it is provided that in case of temporary illness or absence of any Judge it shall be lawful for the Governor in his discretion to appoint a fit and proper person to fill the office of such Judge until he shall resume the duties thereof. Now it appears that the Chief Justice of the Gold Coast had appointed Monday, 16th August, 1943, for the hearing of this appeal before a Court of Appeal consisting of himself, Fuad and Martindale JJ but the latter fell ill at the end of the previous week. No other judge was available to form a Court for various reasons, and so to prevent the expense and inconvenience of a long adjournment, the case was put of till 17th August, and in the meantime the Governor appointed Mr. Quashie Idun a District Magistrate, to be an acting judge of the Supreme Court, the date of his appointment, as appears from the Gazette, being 17th August. On that day therefore he became an acting judge of the Supreme Court of the Gold Coast.

In their Lordships' opinion he was a person for the time being performing the duties of such office, and it was unnecessary that he should first have acted as a judge in some other cause or proceeding before he was qualified to sit in the Court of Appeal. It was also contended that his appointment was bad because he was not expressly appointed to act in place of Martindale J. but in their Lordships' opinion he was appointed in fact to act in place of that learned Judge who was prevented by illness from sitting on the appointed day. No doubt another of the puisne judges might have sat in the Court of Appeal had one been available and the acting judge could then have sat in the Supreme Court. But the fact remains that the illness of Martindale J. caused a temporary vacancy, which under section 9 could be filled by the appointment of an acting judge, who during the period of his appointment had all the powers of an ordinary judge. In their Lordships' opinion the decision of the Board in *Butler* v. *R.* (1) on which reliance was placed, had no application to the present case. There the constitution of the Court of Criminal Appeal in Trinidad and Tobago came in question. The legislation establishing that Court at that time was quite different to the Ordinances that have to be considered in this case, and in particular contained no

1. (1939) A.C. 484

such provision as is to be found in section 2 of the West African Ordinance.

The next point that was submitted for the Appellant depends partly on the direction of the learned trial judge and partly on the verdict with regard to the prisoners other than the Appellant who were found guilty by the jury of manslaughter only. As has already been said the Appellant's defence was that he pointed the gun at the dead man only for the purpose of frightening him, that he did not know it was loaded and that it was discharged accidentally. The learned trial judge directed the jury that only in the event of the Appellant's evidence being accepted could a verdict of manslaughter and not murder be returned against him. Their Lordships think it is clear that his direction was that if the jury thought that his account was true the Appellant was on his own showing guilty of manslaughter because the pointing of the gun was in itself as unlawful act from which death resulted. The Court of Appeal however held that to be a misdirection, because, they said, pointing a gun which he did not know was loaded was not an unlawful act. On this point their Lordships are in agreement with the learned trial judge and disagree with the view taken by the Court of Appeal. Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse, and there was none here as the dead man was running away, it is an unlawful act. They need only to refer among the many cases on the subject to *R.* v. *Jones* (1) and *R.* v. *Weston* (3). But they agree with the Court of Appeal that by their verdict of murder the jury show that they rejected the Appellant's evidence on this subject. Then it is said that as tha other accused were only abettors and were found to have abetted manslaughter only it is imposible for the verdict of murder against the accused to stand. Their Lordships have not to consider the case of the other accused whose conviction have been quashed but they are quite unable to agree with the argument that because the jury found those accused persons guilty only of manslaughter that can affect the verdict of murder against the principal offender. There was ample evidence of deliberate firing by the accused and but for the point with which their Lordships will now proceed to deal they would not have been able to advise His Majesty to allow the Appeal.

It was finally submitted on behalf of the Appellant that as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter this ought to have been submitted by the Court to the jury, and the failure to do so on the part of the trial judge and the failure to consider it by the Court of Appeal was enough to justify the Board entertaining the Appeal on the ground that there had been a failure of justice in this respect. It does not appear that any attempt was made in either of the Courts below to argue that there was sufficient provocation to reduce the crime to manslaughter and indeed as the defence relied on was one of accidental killing it is not surprising that counsel for the prisoner did not attempt to set up what would appear to be inconsistent with that defence. But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the judge must put that question to the jury. This was distinctly laid down in *R.* v. *Hopper* (4) a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and attempt had been made at the trial to rely on provocation. This ruling was expressly approved by the House of Lords in *Mancini* v. *R.* (5). The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then whether the defence have relied on it or not the judge must bring it to the attention of the jury because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder. Now in the present case there was undoubtedly a fracas in which at some stage the prisoner took part and in which he was admittedly stabbed at a time before the shot was fired. The case was that the deceased man tried to get into his house after he had retired for the night and that he received the wound while trying to drive off or capture the intruder.

If that was true the stabbing would undoubtedly have amounted to provocation. The prosecution's case was on the other hand that the

2. 12 COX. C. C. 628
3. 14 COX. C. C. 346
4. (1915) 2 K.B. 431
5. (1942) A.C. 1

disturbance was caused by the villagers attacking the dead man and his fellow smugglers for the purpose of robbing them. As the case developed at the trial the truth of these two versions became immaterial, but on the issue of provocation it was all important. If a man is struck or stabbed while defending himself or his property or while trying to apprehend a thief there can be no question but that it amounts to provocation of the most serious character. The jury accordingly ought to have been told to consider whether the accused received his wound while acting in defence of his property or whether he got it in consequence of an attempt by him to steal from or injure a man who had done him no harm. That would have enabled them to say whether there was provocation in fact. Then another question would have arisen. The law relating to murder and manslaughter in the Gold Coast is contained in the Criminal Code, but in all material respects the Code reproduces the Common Law of England on the subject. Section 233 provides that intentional homicide shall be manslaughter only, if among other matters of extenuation it is proved on the accused's behalf that he was deprived of the power of self control by such extreme provocation given by the person killed as is mentioned in section 234. Among the matters which may amount to extreme provocation is an unlawful assault of such a kind......as to be likely to deprive a person being of ordinary character and in the circumstances in which he was of the power of self-control. Then section 235 excludes the benefit of provocation where the accused was not in fact deprived of the power of self-control and also where after the provocation such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control. This puts into statutory form what has for long been the law in this country. Now it may be said with a great deal of force that the prisoner's own evidence was that he had not lost self-control. So it might have been in *Hopper's case* (4), (*supra*). In both cases it was inevitable that this should be so seeing that the line of defence was accident. But if the jury reject that defence it yet may be that in truth the shooting was due to a lack of self-control caused by provocation. Then again it can be said that as there had been a chase and the dead man had fled to a house and was killed while he was escaping from the house and was shot from behind there must have been time for an ordinary person to have regained control of his passion. In their Lordships' opinion however the question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control and whether sufficient time had elapsed to enable control to be regained are questions for the jury. There may no doubt be cases where the facts were such that they could not be made the subject of extenuation; for instance a blow or wounding one day, and a killing after a night had elapsed. Here though there is no evidence how long after the stabbing the shooting took place it seems clear it was all in the course of one continuing fracas. The tests have to be applied to the ordinary West African villager and it is on just such questions as these that the knowledge and commonsense of a local jury are invaluable. In both *R.* v. *Hayward* (6) and *R.* v. *Thomas* (7) some time had elapsed between the provocation and the fatal act, but in both cases it was left to the jury to say whether in the circumstances the crime amounted to murder or only man-slaughter. It follows therefore that the direction to the jury that the question of man-slaughter could only arise if they accepted the accused's evidence that the shooting was accidental was wrong. It has resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime. The principles upon which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the appellant in the case. It was not indeed raised till his junior counsel addressed the Board, but in view of the opinion of the House of Lords in *Mancini's* case (5) (*supra*) as to the duty of the Court in such circumstances as they find existed here they have thought it right to consider the matter, although not raised in the printed case. It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction. In these circumstances it is proper to take the course

6. (1833) 6 C. & P. 157
7. (1836) 7 C. & P. 817

followed by the Court of Criminal Appeal in *Hoppers case* (4) (*supra*) and substitute for the jury's verdict one for the lesser offence. Their Lordships have accordingly humbly advised His Majesty that this appeal should be allowed and the verdict of guilty of murder and the sentence of death passed on the appellant should be set aside; that the case should be remitted to the West African Court of Appeal with directions to them to substitute for the verdict found by the jury a verdict of guilty of man-slaughter and to pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that offence.

PRIVY COUNCIL

(Appeal from Lahore)

July 3, 1945

LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

CHAINCHAL SINGH v. KING EMPEROR

Evidence Act (I of 1874), S. 33—Conditions for admitting statement of witness in committing court.

Where it is desired to have recourse to S. 33 Evidence Act on the ground that a witness is incapable of giving evidence, that fact must be proved and proved strictly.

It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case, which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. The court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved.

It is not necessary in every case that there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness.

Where there was no evidence at all except that the policeman found the witness was ill thirteen days before the trial.

Held, *that the policeman was not competent to speak to the illness and that there was no proof before the court that the witness was incapable of giving evidence at the trial.*

Consent of the counsel for the defence to the admission of the evidence does not do away with the necessity of the court being satisfied by proof

In very many of the cases, the accused is not represented before the committing magistrate, so while he has the opportunity to cross examine, it is not often that this would be effectively done. This is another reason for exercising great care before admitting a statement.

Before the Privy Council will advise His Majesty to allow an appeal in a criminal case on the ground of misreception of evidence, they require to be satisfied that grave and substantial injustice has been caused thereby.

A. G. P. Pullan, for Applt.

B. J. Mackenna, for Respt.

JUDGMENT

Lord Goddard: This is an appeal by special leave from a judgment of the High Court of Lahore dismissing an appeal by the appellant from a conviction for murder by the Additional Sessions Judge of Amristar. The question of law which arises and was the ground on which special leave was given is whether the previous statement of a witness for the prosecution made before the committing Magistrate was properly admitted at the trial under Section 33 of the Indian Evidence Act, 1872. While contending that the statement was properly admitted, the Crown submits that even if it ought to have been rejected, there was ample evidence justifying the conviction and that accordingly no grave or substantial injustice has been done. Their Lordships have already stated that they will humbly advise His Majesty that the appeal should be dismissed and now proceed to give their reasons.

The appellant was charged before the learned Additional Sessions Judge along with thirteen others with the murder of one Sohan Singh. The Sessions Judge convicted seven of the prisoners and sentenced them all to death and acquitted the remaining seven. All the convicted persons appealed and the High Court upheld the conviction of and sentence on the appellant: they upheld the conviction of one other of the prisoners but substituted a sentence of transportation for life for that of death and quashed the convictions of the other appellants. The evidence showed that there was undoubted enmity between the murdered man and the appellant and there is also no doubt but that the former was attacked

by a considerable number of persons, some of whom were armed with weapons, that he was killed and his body afterwards disposed of so that no trace of it has been found. It has not, however, been disputed before the Board that there was not ample evidence upon which it could be found that the man was murdered, and the only question was whether the evidence showed that the appellant took part in the murder. The murder took place at the Gorewala well in the village where the murdered man was lying on a cot. There were several persons called who alleged they were eye-witnesses. Among them was a "patwari," Lachhman Das, who happened to be at the village that night in the course of his duties. He was examined before the committing Magistrate and there gave evidence in considerable detail showing that the appellant took a prominent part in the attack on the deceased, and he was cross-examined by Counsel for the accused. On 8th December, 1943, the appellant, along with the other accused persons, was committed for trial to the Sessions which were held on 19th January, 1944. On 6th January, a summons was served on Lachhman Das ordering him to appear and give his evidence at the trial on the 19th. This summons was served upon him by a Police Officer, Canda Singh. Lachhman Das wrote on the summons:—

"Sir, I am seriously ill and am unable to attend the Court. My statement may kindly be recorded at my place of residence."

and gave it to the Police Officer. He did not appear at the trial and the Officer was called and his evidence was as follows:—

"I was entrusted with the summons issued for the service of Lachhman Das. I found him ill and unable to move from his house. He is suffering from tuberculosis. I got a report to that effect made by the Patwari on the summons."

The Public Prosecutor, on that evidence, applied to have his statement made before the Magistrate transferred to the Sessions file and read, under Section 33 of the Evidence Act. It appears that Counsel for the accused stated that he had no objection to this being done and thereupon the learned Additional Sessions Judge admitted the statement. The material provisions of Section 33 are in these words:—

"Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of of the same judicial proceeding, the truth of the facts which it states, when the witness is incapable of giving evidence or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case the Court considers unreasonable."

Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case, a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence. In the present case the only evidence was that of the Police Officer already mentioned and his visit was thirteen days before the trial. The officer was not a proper person to prove from what disease the witness was suffering; he could only say what someone told him. If such evidence as he gave were sufficient, it would mean that any reluctant witness could take to his bed when he found there was a likelihood of being served with a witness summons and get execused from attendance by telling the server that he was suffering from some serious complaint. Their Lordships do not mean to lay down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England, see *R.* v *Noakes* (1) and there is no reason for a different rule to apply in India. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness. Here there was no evidence at all except that the policeman found the witness was ill thirteen days before the trial and as he was not competent to speak to the illness, their Lordship are of opinion that there was no evidence before the Court that he was incapable of giving evidence on January 19th. The learned Additional Judge was no doubt largely influenced by Counsel for the accused consenting to the evidcnce being read, but in their Lordships' opinion, that does not do away with the necessity of the Court being satisfied by proof. Neither Counsel nor his

1. (1917) 1 K.B. 531

client could have had any personal knowledge on the subject, unless indeed Counsel had recently seen the witneess, in which case he could have so informed the Court and not merely given a consent. It may be that there are some matters as to which it would be possible for a prisoner to consent to be taken as proved though no strict evidence was given; if there are, as to which their Lordships express no opinion, they could only be such as might reasonably be supposed to be particularly within the knowledge of the accused. Their Lordships accordingly consider that this previous statement was wrongly admitted. Their Lordships would also observe that though in this case, the accused was represented before the committing Magistrate and the witness was, therefore, cross-examined, in very many of these cases, the accused is not represented at the stage, so while he has the opportunity to cross-examine, it is not often that this would be effectively done. This is another reason for exercising great care before admitting a statement.

Next it was contended for the appellant that if the previous statement of Lachhman Das was inadmissible the appeal must be allowed, as it was on that evidence that the High Court relied in upholding the conviction. Before this Board will advise His Majesty to allow an appeal in a criminal case on the ground of the misreception of evidencet hey require to be satisfied that grave and substantial injustice has been caused thereby. In their Lordships' opinion, there was ample evidence to justify a conviction in this case apart from Lachhman Das's statement, and they feel no doubt as to the guilt of the appellant. The trial Judge who saw and heard the witnesses saw no reason to disbelieve the eye-witnesses on the main points in their evidence. It appears to their Lordships that the main reason the High Court had for not accepting their evidence as satisfactory was that it did not accord in all aspects with that of Lachhman Das, and because he apparently did not see the two principal witnesses, Mula Singh and Mangal Singh, at the scene of the murder, to which he himself was not particularly close. Considering the number of people who were collected at the spot, either as participants in the attack or as onlookers attracted by the uproar, it is no ground for disbelieving witnesses who have given an apparently reliable account and whose evidence was believed by the trial Judge, that another witness says he did not see them there, as might well be the case. Another reason given by the High Court for disbelieving Mula Singh was that he gave as a reason for his presence on the scene that he was suffering from dysentery and had gone to the well to relieve himself. The High Court do not believe he would have gone a distance of 600 *karams* for this purpose But there was no evidence that his house was so far from the well and he denied that it was. Moreover, if the statement of Lachman Das is excluded, it follows that the principal reason given by the High Court for not accepting the evidence of the eye-witnesses who as has already been said were not disbelieved by the learned Judge, no longer exists. Looking at the evidence as a whole, their Lordships entertain no doubt that the appellant took an active part in the murder, and they were accordingly unable to advise His Majesty that there were any grounds for quashing the conviction.

—— *Appeal dismissed*

PRIVY COUNCIL

(Appeal from the Supreme Court of Trinidad and Tobago).

November 21, 1945

VISCOUNT SIMON, LORD THANKERTON & SIR JOHN BEAUMONT.

Joseph Melville

v.

The King

Statutes—Interpretation—Children Ordinance of Trinidad and Tobago (Revised Ordinance, 1940; Ch. 4, No. 21) S. 19 & Schedule—General words of concluding sentence in schedule, if can override effect of first and more specific sentence.

S. 19 of the Children Ordinance provided for the reception of unsworn evidence from a child of tender years inter alia, *when the offence charged was any of the offences mentioned in the schedule thereto. The Schedule ran as follows:*

"Any offence under sections 25 (exposing children under the age of 2 years), 49 (abduction of girl under 14 years), or 55 (child stealing) of the Offences against the Person Ordinance, and any offence against a child or young person nnder sections 6 (manslaughter), 36 to 42 inclusive (defilement of women etc.), 46 (indecent assault) or 62 (gross indecency) of that Ordinance ... ...

"Any other offence involving bodily injury to a child or young person"

Held *that the effect of the first sentence of the Schedule was that children's unsworn evidence was inadmissible when the offence charged was murder; and that the general words of the concluding sentence in the*

Schedule ought not to be read as admitting unsworn evidence in a class of offences already excluded by the effect of the first and more specific sentence.

S. P. Khambatta & H. J. Umrigar for Applt.

B.J.M. Mackenna for Respt.

JUDGMENT

Viscount Simon: This is an appeal *in forma pauperis* by special leave from a decision of the Court of Criminal Appeal of Trinidad and Tobago, on a question of law reserved for the opinion of the Court by the trial judge in a case of murder The appellant, who is an adult, was indicted before Mr. Justice Smith in the Supreme Court of Trinidad and Tobago for the murder of a boy of between 7 and 8 years of age. He was convicted by the jury and sentenced to death, subject to the determination of a question of law raised by way of Case Stated by the trial judge for the opinion of the Court of Criminal Appeal of the Colony. The point of law is whether the unsworn evidence of two children, one of 9 or 10 years of age and the other of 11 years of age, was rightly received at the trial. Mr. Justice Smith, while of opinion that the two children possessed sufficient intelligence to justify the reception of the evidence and sufficient understanding to realise the duty of speaking the truth, considered that they did not understand the nature of an oath and the testified unsworn. He took the view that their unsworn testimony was admissible under the authority contained in s. 19 of the Children Ordinance of Trinidad and Tobago (Revised) Ordinance, 1940; Chapter 4, No. 21).

The Court of Criminal Appeal in Trinidad decided that the evidence was rightly admitted under the authority conferred by the section, which authorises, in certain classes of offences therein referred to, the reception of unsworn evidence from a child of tender years if the child is considered by the Court to be possessed of sufficient intelligence and of an understanding of the duty of speaking the truth even though the child does not understand the nature of an oath. The whole question now to be decided is whether, when the offence charged is the murder of a child by an adult, this section applies.

Section 19 of the Children Ordinance enacts as follows:—

"19. Where, in any proceeding against any person for an offence under this Part of this Ordinance, or for any of the offences mentioned in the Schedule hereto, the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the Court understand the nature of an oath, the evidence of that child may be received though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; . . . .'

There follow provisos requiring that there must be corroboration before a person is liable to be convicted under the testimony thus admitted, and providing for the punishment of an unsworn child witness who wilfully gives false evidence.

The offences included in the Part of the Ordinance referred to do not include murder, and the question therefore comes down to this: Is murder, or at any rate murder of a child, an offence mentioned in the Schedule to the Ordinance?

The Schedule runs as follows:—

"Any offence under sections 25, 49, or 55 of the Offences against the Person Ordinance, and any offence against a child or young person under sections 6, 36 to 42 inclusive, 46 or 62 of that Ordinance, or under sections 4 or 5 of the Summary Offences Ordinance.

Any other offence involving bodily injury to a child or young person."

The first sentence of the Schedule thus picks out from the Offences against the Person Ordinance (Revised Ordinances, 1940; Chapter 4, No. 9) certain offences, some of which in their nature cannot be committed against an adult, viz. section 25 (exposing children under the age of 2 years); section 49 (abduction of girl under 14 years) and section 55 (child stealing); and others all of which might in their nature be committed against persons of any age, but which are only included in the Schedule when committed against a child or young person, viz. section 6 (manslaughter); section 36-42 (defilement of women, etc.); section 46 (indecent assault) and section 62 (gross indecency). It is particularly to be noted that murder (section 4 of the Offences against the Person Ordinance) is not included in the Schedule, nor attempt to murder (section 9), Similarly rape (section 35) is not included, though lesser offences of a sexual character are, and sodomy and attempted sodomy are also left out. It is manifest, as far as this part of the Schedule is concerned, that the policy of the legislature was to regard sworn evidence as the only evidence to be admitted in the most serious of the offences against the person.

If, therefore, the first sentence of the Schedule is to be understood as taking the whole list of offences in the Act under review and including some as capable of being tried with

the help of unsworn children while the rest of such offences are excluded from the operation of section 29, it is plain that the children's unsworn evidence in this case of murder was improperly stated that if this evidence were inadmissible, he would not have called on the defence and the conviction would have to be quashed.

The argument that the children's unsworn evidence is admissible, even in a case of murder, is advanced under two heads :—

(*a*) It is first said that section 2 of the Evidence Ordinance of Trinidad and Tobago (Revised Ordinance, 1940; Chapter 7, No. 9) justifies what was done. This section provides that "Whenever any question shall arise in any action, suit, information, or other proceeding whatsoever in or before any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, touching the admissibility or the sufficiency of any evidence, or the competency or obligation of any witness to give evidence, or the swearing of any witness, or the form of oath or affirmation to be used by any witness, or the admissibility of any question put to any witness, or the admissibility or sufficiency of any document writing, matter, or thing tendered in evidence every such question shall be decided according to the law of England for the time being in force." The argument then is that section 38 of the English Children and Young Persons' Act, 1933 (23 Geo. 5, Chapter 12), generalises the admission of unsworn testimony by a child of tender years who is considered by the court to have the qualities of mind and morals before-mentioned, but subject to a proviso requiring corroboration and that consequently the same latitude of admissibility of such evidence must now prevail in Trinidad. Their Lordships agree with the Court of Criminal Appeal in Trinidad that this argument is unsound. Section 2 of the Evidence Ordinance applies only in cases where there is no specific provision to the contrary in Trinidad law. It refers mainly to rules about hearsay, corroboration, and the like and does not purport to make the provisions of an English Statute a Master code which automatically nullifies the express law enacted for Trinidad and Tobago.

(*b*) The second, and more substantial, argument used by the respondent turns on the second section of the Schedule to the Children Ordinance which includes "any other offence involving bodily injury to a child or young person" among the offences in respect of which the unsworn evidence of a child may be admitted. It is contended that the charge of murder of a child falls within these words. Their Lordships are of opinion that the short and conclusive answer to this argument is that it would give to this general expression an effect which would overrule the specific exceptions involved in the first sentence of the Schedule of which the offence of murder is one. It may not be easy to give a confident interpretation to these final words, but there are offences not included in the Offences against the Person Ordinance which might involve personal injury to a child or young person, e. g., the offence of driving a motor-car to the public danger in a case where the motor-car injured a child: but whatever may be the difficulty of giving practical illustrations of the "other offences" referred to, it would not be a proper construction of the Schedule to allow these general words to nullify the provision in the first sentence which in effect excludes such grave offences as murder, or rape, or sodomy.

The words of the Schedule and indeed of the whole Children Ordinance are lifted bodily from the Children's Act of 1908 of this country, and a similar arrangement of specified sections in the Offences against the Person Act, 1861, followed by "any other offences involving bodily injury to a child under the age of 16 years" appeared in the Prevention of Cruelty to Children Act, 1894 (57-58 Vict, Chapter 41). In connection with section 12 of that Act this concluding sentence in the Prevention of Cruelty to Children Act has been the subject of consideration in two reported cases, one from England and the other from Scotland, not indeed where the evidence of a child was involved, but where it was sought, by virtue of section 2 and the Schedule, to justify the calling of a wife as a competent though not compellable witness against her husband when accused of cruelty to a child.

This English case [*R.* v. *Roberts* (1)] was a trial for ceasing grievous bodily harm to a child under 16 years of age, tried at Liverpool Summer Assizes before Mr. Justice Cave. The Crown contended that the offence charged came within the concluding clause of the Schedule but Mr. Justice Cave ruled that the "other offences" contemplated by these words are offences of which it is an essential part that the person injured is a child under 16 years of age. The correctness of this decision has been doubted in the textbooks, and cer-

1. (1898) 18 Cox, 530

tainly could not be applied in a case like the present where some of the offences specifically brought by the Schedule within the operation of the section permitting unsworn evidence are offences which are not in their nature essentially perpetrated against children and not against adults. But in any case their Lordships do not consider that the right decision in the present appeal should be influenced by Mr. Justice Cave's ruling in the case referred to.

In Scotland, on the contrary, in a case *Lord Advocate* v. *Fraser* [2] where husband was being tried for culpable homicide of a daughter, aged 12, Lord Justice-General Balfour ruled that the wife of the accused was an admissible witness, and thus in effect gave to the concluding sentences of the Schedule an interpretation which cancelled out the omission of the section relating to the same offence in the Offences against the Person Act, 1861. The last named Act, however, did not apply to Scotland and the offence charged was an offence only at Common Law. The argument unsuccessfully advanced for the accused was that any "any other offences" in the Schedule must be "statutory offences of which the essence was that the victim was under 16 years of age" and that this construction, therefore, excluded the Common Law crime of culpable homicide.

Their Lordships do not think that they can take this ruling as a guide in construing the Children Ordinance and applying it to this case.

Dealing with the matter as untramelled by authority, their Lordships, as already stated hold that the general words of the concluding sentence in the Schedule to the Children Ordinance ought not to be read as admitting unsworn evidence in a class of offence already excluded by the effect of the first and more specific sentence.

Their Lordships have therefore humbly advised His Majesty that the appeal must be allowed and the sentence quashed.

Appeal allowed.

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2. (1901) 3 F (J) 67

FEDERAL COURT.

[Appeal from Lahore.]

Criminal Appeal No. 11 of 1945.

January 31, 1946

SIR PATRICK SPENS C. J. SIR S. VARADACHARIAR & SIR MD. ZAFRULLA KHAN JJ.

Ex. Rana Birpal Singh of Bhajji State.

v.

The King Emperor.

Criminal Procedure Code (V of 1898), *S. 491* (3)— *Effect of — Bengal State Prisoners Regulation (III of* 1818)—*Detention of deposed ruler of State.*

Once the court is satisfied that a person is being detained under Regulation III of 1818, *there is no jurisdiction under S.* 491, *Cr. P. C. which the Court can exercise in the matter, even though on an investigation of the facts it might find that the detention was illegal or improper.*

The jurisdiction under S. 491, *Cr. P. C. is wholly statutory and governed by the terms of the section.*

A Ruler of a State who has been deposed is subject to the provisions of Regulation III of 1818.

K. L. Gauba, instructed by *Ram Krishna Kuba* for Applt.

Sir Noshirwan Engineer Advocate General of India & *Mohommad Sadiq*, instructed by *K. Y. Bhandarkar*, for Respt.

JUDGMENT.

SPENS, C. J.: Prior to the 8th September, 1940, the appellant in this case, Birpal Singh, had been for some time the Rana of the State of Bhajji, one of the Simla Hill States, and duly recognised as the ruler thereof. On the 8th September, 1940, he was brought to Simla and was lodged in the Ripon Hospital there. On the 9th September, 1940, a warrant addressed to the Deputy Commissioner Simla, was issued under the provisions of the Bengal State Prisoners Regulation 1818, in the following terms :—

Whereas the Governor-General in Council for good and sufficient reasons, being reasons connected with the discharge of the functions of the Crown in its relations with Indian States, has seen fit to determine that Birpal Singh, *ex*-Rana of Bhajji, shall be placed under personal restraint at Simla, you are hereby required and commanded in pursuance of that determination to receive the person abovenamed into your custody and to deal with him

in accordance with the orders of the Government and provisions of the Bengal State Prisoners Rugulation, 1818.

By order of the Governor-General in Council.

(Sd.) R. Tottenham.

Additional Secretary to the Government of India."

In pursauance of this warrant the appellant continued to be lodged in the said Ripon Hospital. There, on the 21st day of September, 1940, he was personally examined by Lientenant Colonel A Sargood Fry, I. M. S. Civil Surgeon, Simla East, who forthwith issued a certificate that the appellant was "a lunatic and proper person to be taken charge of and detained under care and treatment." It is not without importance to notice that Colonel Fry's certificate on the face of it refers to Ss. 18 and 19 of the Indian Lunacy Act (IV of 1912), and is obviously in the form prescribed by that Act. Some time seems to have elapsed before any action was taken on this certificate. On the 11th April, 1941, a second warrant was issued under the provisions of the Bengal State Prisoners Regulation, 1818 addressed to the Superintendent of the Indian Mental Hospital at Lahore in the following terms :—

"Whereas the Governor-General in Council for good and sufficient reasons being reasons connected with the discharge of the functions of the Crown in its relations with Indian States has seen fit to determine that Birpal Singh, *ex*-Rana of Bhajji shall be placed under personal restraint at the Indian Mental Hospital at Lahore, you are hereby required and commanded, in pursuance of that determination, to receive the person abovenamed into your custody and to deal with him in accordance with the orders of the Government and the provisions of the Bengal State Prisoners Regulation of 1818."

The warrant was expressed to be "By order of the Governor-General in Council" and was signed by an Additional Secretary to the Government of India in the Home Department. In pursuance of this warrant, the appellant was removed from Simla and lodged in the said Mental Hospital at Lahore, and there he has been detained ever since.

It would appear that shortly after the issue of the warrant of the 11th April, 1941, some doubts were felt by the issuing authority as to the validity of such a warrant, particularly as to whether it constitued a proper authority to the Medical Superintendent or other responsible official in charge of a Mental hospital, for the reception and detention of the appellant and others, if any others there were in *simili casu*, having regard to the provisions of s. 4 and other provisions of Indian Lunacy Act 1912. Accordingly on the 26th June 1941 an Ordinance (No. V. of 1941) was made and promulgated by His Excellency the Governor-General in the following terms :—

"The State Prisoners (Detention of Lunatics) Ordinance, 1941."

(Ordinance No. V of 1941)

June 26, 1941

An Ordinance to authorise the reception and detention in an asylum of individuals committed by warrants issued under the Bengal State Prisoners Regulations, 1818 to detention in that asylum.

Whereas an emergency has arisen which makes it necessary to authorise the reception and detention in an asylum of individuals committed by warrants issued under the Bengal State Prisoners Regulation, 1818 (Ben. Reg. III of 1818) to detention in that asylum;

Now, therefore, in exercise of the powers conferred by s. 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

Short title, extent and commencement.

1. (1) This Ordinance may be called The State Prisoners (Detention of Lunatics) Ordinance, 1941.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Power to receive and detain in asylnm persons restrained under Regulation III of 1818.

2. Notwithstanding anything contained in the Indian Lunacy Act, 1912, a warrant of commitment issued under s. 2 of the Bengal State Prisoners Regulation, 1818 (Ben. Reg. III of 1818), directing the detention in an aslyum of an individual placed under personal restraint in pursuance of that section, who is, in the opinion of the authority issuing that warrant, insane, shall be and shall be deemed to have been from the time such warrant was issued sufficient authority for the reception and detention of that individual in that asylum or in any other asylum to which he may be lawfully transferred."

For some considerable time thereafter no legal action was taken by or on behalf of the appellant. On the 10th December, 1943, however one Dr. P. N. Seth of Lahore as next friend of the appellant, made an application for directions in the nature of *habeas corpus* under Ss. 491 and 561-A of the Code of Criminal Procedure in the matter of the detention of the appellant. The proceedings are reported in A I.R. (32) Lahore, at p. 274 *et seq.* Eventually, on the 7th June, 1944, after various questions had been referred to and decided by a Full Bench, the application was dismissed. A certificate under s. 205 of

the Government of India Act, 1945, having been granted by the Full Bench, Dr. Seth filed a belated petition of appeal in this Court which on the 12th December, 1944, was dismissed on account of the undue delay in filing the petition.

Meantime, on the 7th, 12th and 27th October, 1944, the appellant personally wrote and addressed a series of communications to the Chief Justice of the High Court at Lahore, which were duly forwarded through the Medical Superintendent of the Mental Hospital in which the appellant was detained. These somewhat confused communications, the learned Chief Justice decided should be treated as further applications by the appellant under s. 491 of the Code of Criminal Procedure, and they were referred to a Division Bench (Abdur Rahman and Munir JJ.) for disposal. At a preliminary hearing on the 26th January, 1945, the Division Bench directed that Mr. Gouba, who appeared for the appellant, should put into more formal shape the points which he desired to argue and give notice of them to the Crown and adjourned the applications. This having been done and points of reply put in on behalf of the Crown the applications were heard on the 4th and 5th June, 1945, and judgment was delivered dismissing the applications on the 12th June, 1945. On the 22nd June, 1945, a certificate was granted to the appellant under s. 205 of the Government of India Act, 1935. On the 9th August, 1945, petition of appeal was filed in this Court during the vacation. On the 5th October, 1945, the appellant filed an application under O. XL, rr. 1, 3 and 5 of the Federal Court Rules and s. 151 of the Code of Civil Procedure, praying that the delay, if any, in filing the appeal might be condoned. That application the Court ordered to be put down for hearing with the petion of appeal in this case. On the 21st November, 1945, at the request of the appellant, the court made an order that the appellant should be produced at the hearing of the appeal to appear and plead in person. The appellant was so produced, but upon the appeal being called on for hearing, Mr. Gauba appeared on behalf of the appellant.

The first matter raised was whether or not, having regard to the provisions of O. XVII, rr. 1 and 2, and O. II. r. 3 of the Federal Court Rules, the petition of appeal had been presented in due time. It was urged by the Advocate-General of India that the order appealed against must be taken to have been made in the exercise of the criminal jurisdiction of the Lahore High Court and that accordingly the thirty days period prescribed by O. XVII, r. 1 applied. He further contended that this Court was not "closed" within the meaning of s. 4 of the Indian Limitation Act, 1908, during vacation, since in compliance with O. II, r. 3, the offices of the Court were open during the vacation. At the same time the Advocate General admitted that even if he succeeded in all his contentions, the Court could still in the exercise of its discretion condone the delay, if any. The Court accordingly, without a full discussion and without deciding whether the order had been made in the exercise of the criminal jurisdiction of the Lahore High Court or whether the Court was or was not "closed" during the material period, decided to hear the appeal on its merits.

On being asked to indicate the points which he wished to argue, including the constitutional points in respect of which the certificate under s. 205 of the Government of India Act, 1955, had been granted, Mr. Gauba stated that he desired to submit (a) that the appellant was still *de jure* the ruler of Bhajji State, and as such not within the category of persons in respect of whom any warrant of commitment could be issued under the Bengal State Prisoners Regulation (III of 1818), (hereafter referred to as "Regulation III") (b) that Ordinance V of 1941 was *ultra vires* the ordinance-making powers conferred on the Governor-General by s. 72 of the Ninth Schedule to the Government of India Act, 1935, and (c) that in any event the conditions of sub-clause (a) of the Ordinance had not been carried out, as no further warrant had been issued after the promulgation of the Ordinance and there was no evidence, or not sufficient evidence that the issuing authority of the previous warrants ever held the opinion that the appellant was insane. At one stage Mr. Gauba also urged that the form of the warrant of the 11th April 1941, did not on the face of it sufficiently indicate that it was a warrant issued by the Central Government as required by s. 7-A of Regulation III, and that positive evidence that the matter had been considered and orders given for its issue by the appropriate officials was required before a Court could hold the warrant a valid warrant under Regulation III.

In spite of the fact that s. 491 of the Code of Criminal Procedure, on which the appel-

lant's application to the Court was founded, contains in s. s. (3) thereof the provision; "Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818", we thought it desirable that Mr. Gauba should be permitted to argue all his points. It is however in our judgment clear that once the Court is satisfied that a person is being detained under Regulation III, there is no jurisdiction under s. 491 which the Court can exercise in the matter. And throughout there has been no suggestion that there is any other jurisdiction which could be exercised by the Court in these proceedings. Accordingly, in our judgment, the material question in this case is: Is the appellant a person detained under Regulation III? If he is this application must fail. The jurisdiction under s. 491 is wholly statutory and governed by the terms of the section. Moreover, it must be appreciated that the very basis of jurisdiction under s. s (1) (b) of s. 491, which is the only sub-section under which the Court could be asked to assist the appellant in this case, is expressed to be "illegal or improper detention in public or private custody", and yet by virtue of s. s. (3) in cases of persons detained under Regulation III, s. s. (1) (b) has no application. It seems to us therefore to follow that something more than allegations that a person is being "illegally or improperly" detained under Regulation III is necessary before the Court can get over the bar to jurisdiction under the section imposed by s. s. (3). Complaints as to the illegality or impropriety of the detention, if the detention be under Regulation III, can be dealt with under the procedure laid down in Ss. 3, 4 and 5 of Regulation III and may well be the basis of other claims which a Court can properly entertain, but such allegations cannot in our judgment be sufficient to give the Court jurisdiction under s. 491. If on the facts of the case it is clear that a person is being detained under Regulation III, even though a Court might think if it investigated those facts, it might find that the detention was illegal or improper, still the Court cannot in our judgment interfere under s. 491. In this case it is clear that the Government has been claiming to detain the appellant from the 9th September, 1940, onwards under Regulation III.

Only one point therefore raised on behalf of the appellant in this case could in our judgment possibly have enabled the Court to exercise jurisdiction under s. 491, and that was if in fact the appellant is a person to whom Regulation III does not or cannot apply at all. Then it might perhaps be possible to hold that there was no detention at all (legal or illegal, proper or improper) under Regulation III. It seemed therefore to us that if the appellant still had the status of ruler of Bhajji State, it might be that he was a person to whom Regulation III had no application whatsoever. After hearing Mr. Gauba fully on this point and the reply of the Advocate-General, and perusing a certificate dated the 4th May, 1945, signed by the Secretary to His Excellancy the Crown Representative which we permitted the Advocate-General to put upon the record, we are satisfied that neither on the 9th September, 1940, nor at any date since, has the appellant had the status of a ruler of a State. The certificate referred to is in the following terms:—

> "In the discharge of the functions of the Crown in its relations with the Indian State. His Excellency the Crown Representative, on behalf of His Majesty ceased to recognise Birpal Singh on and from the 8th September, 1940, as the ruler of the State of Bhajji, and from that date Ram Chander Pal Singh son of Birpal Singh, was recognised by His Excellency the Crown Representative on behalf of His Majesty as the Ruler of that State. Neither on the 9th September, 1940, nor on any subsequent date was Birpal Singh recognised by or on behalf of His Majesty as the Ruler of the State of Bhajji.
>
> (Sd.) C. L. Griffen,
>
> *Secretary to His Excellency the Crown Representative*

But in addition to this it is clear from statements made by the appellant himself in an affidavit made by him on the 10th February, 1944, in the earlier proceedings brought by Dr. Seth on his behalf, to which the Advocate-General invited our attention, that he admitted that he was deposed on the 8th September, 1940, and informed of the fact at the time. The appellant has now and then suggested that his removal from the *gadi* was not legal or proper but that is not a matter with which the Court can deal. In our judgment it is clear that on the 9th September, 1940, he was subject to and had since been subject to the provisions of Regulation III, and was and has since the 9th September, 1940, been a person detained under Regulation III. In our judgment therefore there is no jurisdiction under s. 491 of the Code of Criminal Procedure which the Court can exercise in this case.

We do not propose to go into the other questions raised and argued by Mr. Gauba. At most they amount to allegations of illegal or improper detention under Regulation III

which even if substantiated would not, for the reasons earlier explained, give the Court jurisdiction under s. 491. But we would put on record that in no way could we have come to any different conclusion to those arrived at by the learned Judges of the High Court at Lahore.

We would add that it is satisfactory that in a case such as this, the Government promptly adopted the suggestions made in the judgment of High Court now under appeal and have had the appellant again examined by a Medical Board who submitted a report dated the 5th September last. We appreciate its production by the Advocate General to us. For the appellant's sake we regret that the conclusions were not more favourable. But we are satisfied from this and the further statement of the Advocate-General made to us that all proper care and attention is being given and is intended to be given to the appellant.

The appeal fails and is dismissed.

Appeal dismissed.

Cr. R. C. No. 922 of 1944
(Cr. R. P. No. 864 of 1944)
March 22, 1955
HAPPELL, J.

Chilukuri Antarvadi Sarma & others
v.
Emperor

Criminal Procedure Code (V of 1898) *S.* 195 (*i*) (*b*)—*Evasion of—Penal Code (XLV of* 1860) *Ss.* 193 *&* 471—*Offence under—Prosecution for offence under S.* 467.

Where the facts disclose an offence under Ss. 193 *and* 471 *Indian Penal Code, the complainant could not be allowed to evade the provisions of S.* 195 (*I*) (*b*) *Criminal Procedure Code by filing a complaint under S.* 467 *of the Penal Code.*

Petition under ss, 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revises the order of the Court of the Stationary Sub Magistrate of Tenali dated 3—11—1944 and made in P. R. C. No. 11 of 1944.

P. Basi Reddi, for Applt.

Public Procecutor (*V. L. Ethiraj*), for Crown

ORDER

This is a petition to revise an order of the Stationary Sub-Magistrate, Tenali, made in P. R.C. No. 11 of 1944 overruling objections to his jurisdiction to take cognisance of an offence punishable under sections 467 and 109 of the Indian Penal Code. A promissory note was brought into existence on the 12th September 1943 for the principal sum of Rs. 450 which purported to be executed by the complainant in favour of the second accused. It was written by the first accused and attested by the third accused. This promissory note was assigned to the fourth accused, and he issued a registered notice to the complainant demanding the amount due under the promissory note and on the complainant denying that he had executed the promissory note, field S C. No. 15 of 1944 on the file of the Subordinate Judge's Court, Tenali, on the footing of the promissory note. The promissory note was sent to the Government Handwriting Expert who gave the opinion that the finger-print on the promissory note was not that of the complainant. On that, the fourth accused had the suit dismissed. The complaint now in question was based on the above facts, and it was dismissed as against the fourth accused under section 203 of the Criminal Procedure Code on the ground that the complaint against him could only be given by the Subordinate Judge's Court, Tenali. With regard to the other accused, it was argued on their behalf that the complaint disclosed offences under sections 193 and 471 of the Indian Penal Code, so that the case fell within the provisions of section 195 (b) of the Criminal Procedure Code, even though the allegations also disclosed an offence under section 467 which is not mentioned in section 195. The Sub-Magistrate overruled the objections on the ground that offences under sessions 193 and 471, Indian Penal Code, are minor offences as compared with section 467, relying on a decision of Lakshmana Rao, J. in *Guruswamy Chettiar* v. *Emperor* (1).

The learned Magistrate has not referred to two decisions of Benches of this Court *Ravanappa R ddi. in re* (2) and *In re Appadorai Nainar* (3) without reference to which the decision in *Guruswamy Chettiar* v. *Emperor* (1) cannot be understood. In these two cases it was held that if the facts disclosed an offence under Section 193 I P.C. parties could not be allowed to evade the provisions of section 195 (1) (b) of the Code of Criminal Procedure by filing a complaint under another provision of the Indian Penal Code.

In *Guruswamy Chettiar* v. *Emperor* (1) Lakshmana Rao, J. referred to but distinguished *Appadorai Nainar, in re* (3) on the ground that in the case before him there was no question

1. (1940) M W N. 1270; Cr. 184
2. (1931) M.W.N. 1314; Cr. 274; I.L.R. 55 Mad 343
3. (1935) M.W.N. 946 (2); Cr. 162 (2); I.L.R. 50 Mad: 165

of evading the provisions of Section 195 of the Code of Criminal Procedure. The facts of the case were that a pleader had used a forged receipt in the course of proceedings against him under the Legal Practitioners Act. The Court thereafter was moved to make a complaint against the pleader for an offence under section 403 and against the maker and the two attestors of the receipt for an offence under section 467 I.P.C. For reasons that are not material the Court did not think it necessary to make a complaint against the pleader and, as regards the other three respondents, it was also of opinion that a complaint need not be made because they could be prosecuted for an offence under Section 467 I. P. C. without a complaint from the court, and the offence under section 193 which could also be said to have been committed did not require a complaint because as compared with the offence under section 467 it was a minor offence. This decision, as already indicated, was upheld in revision by Lakshmana Rao, J.

In the present case the aggrieved party filed a petition in the Civil court asking that court to make a complaint against the four accused and also himself filed a complaint in a Criminal Court. Orders on the petition in the Civil Court do not yet seem to have been passed. In the complaint to the Criminal Court it is true that the object of the forgery is stated to be to force the complainant to come to terms by fabricating documents and again at the end of the complaint to be 'to coerce the complainant to part with property". It is not stated in so many words that the object was to use the forged promissory note in any stage of a judicial proceeding. The facts set out, however, clearly disclose that it was intended, if necessary, to use the document in a judicial proceeding even if it was hoped that the existence of the document would force the complainant to come to terms regarding his occupancy rights without resort to the courts. I am unable to distinguish the facts of the present case from the facts in *Ravanappa Reddi In re* (2), and *In re Appadurai Nainar* (3). It is suggested that there is no evasion because the complainant has asked the civil court to make a complaint. But it is just here, I think, that there is a distinction between the present case and the case decided by Lakshmana Rao, J. The complinant in the case with which he was concerned asked the civil court to make a complaint and was referred to a Criminal Court. There was certainly no question of evasion. But it is not open to the complainant to say that there can be no question of evasion simply because he has *also* asked the Civil Court to make a complaint. The Civil Court might dismiss the application not because it thought that no complaint was required from it but because it did not think it expedient in the interests of justice to make a complaint; and in such circumstances it would certainly be an evasion of the provision of Section 195 simultaneously to press a complaint in a Criminal Court in respect of the same facts.

I have been referred on behalf of the complainant to two cases, one decided by King, J. "*In re Muthuvelu Kudumbam*" (4) and the other by the learned Chief Justice and Chandrasekara Aiyar, J.—*Nallappa Goundan* v. *Chinnammal* (5). These cases cannot help the complainant. In the first of them "*Ravanapu In re*" (2), was distinguished and in the second "*In re Appadurai Nainar*" (3). In *Muthuvelu Kudumban In re* (4) King J, held that a Criminal Court was not debarred from taking cognizance of an offence under Section 211 I.P.C. simply because the facts also disclosed a minor offence under Section 182 I.P.C. in respect of which a special complaint was necessary. But the basis of his decision was that if all the facts were considered the appropriate section of the Indian Penal Code which applied to the offence was section 211. There was thus no question of evading section 195 as in *Ravanappa Reddi In re* (2) by ignoring the elements of the offence which brought it under section 193 and confining attention to the elements which brought it under section 467 in respect of which no special complaint was necessary. In the present case it is clear that the Magistrate can only try the case as a case under section 467 I.P.C. by ignoring the elements which also bring the case under section 193 I.P.C. In *Nallappa Goundan* v *Chinnammal* (5) it was held that a complaint of defamation could be taken cognizance of by a Criminal Court even though the alleged defamatory words were contained in a deposition given in a Civil Court. But here again the case is no authority for the view that a complainant, as in the present case, can ignore the offence committed under section 193 and ask the court to take cognizance of the charge under section 467 alone. It was pointed out in *Nallappa Goundan* v. *Chinnammal* (5) that the offence of defamation was entirely different from the offence of

4. (1936) M.W.N. 641; Cr. 125: I.L.R. 59 Mad. 1013
5. (1941) M.W.N. 1076 : Cr. 168

perjury, and *"in re Appadurai Nainar"*(3) was distinguished on the ground that, as in the present case, it was based on a forged instrument which had been given in evidence and which was not in the same category as a charge of defamation which is an entirely personal matter.

For the reasons given I am of opinion that the present case is governed by the decision in *"in re Ravanappa Reddi"* [2] *"in re Appadorai Nainar"* [3]. That being so the Magistrate had no jurisdiction to take cognizance of the complaint. His order is, therefore, set aside; the complaint is dismissed and this petition is allowed.

N.T.R. — *Petition allowed.*

Cr. R. C. No. 124 of 1946
(Case Referred No. 6 of 1946)
March 7, 1946.

SIR LIONEL LEACH, C. J. & LAKSHMANA RAO, J.

Someshwar H. Shelat, In re

Hoarding and Profiteering Prevention Ordinance (XXXV of 1943), *S.* 12 (3)—*Officers appointed to investigate—If police officers—Criminal Procedure Code (V of* 1898), *S.* 162—*Evidence Act (I of* 1872), *S.* 25.

By reason of S. 12 (3), *Hoarding and Profiteering Prevention Ordinance inserted by Ordinance LIII of* 1944, *officers appointed to investigate offences under the Ordinance are police officers within the meaning of the Criminal Procedure Code and S.* 162 *Criminal Procedure Code applies to statement recorded by them.*

Since the deletion of sub-sec. (3) *of S.* 12 *by Ordinance I of* 1946 *they are no longer police officers within the meaning of the Criminal Procedure Code.*

Case referred for the orders of the High Court under s. 432 of the Criminal Procedure by the Chief Presidency Magistrate, Egmore, Madras in his letter R. O. C. No. 253 of 46-D, dated 22—1—1946.

K. S. Rajagopala Iyengar, for Accused.

The Crown Prosecutor (P. Govinda Menon) for Crown.

ORDER

(SIR LIONEL LEACH, C.J.)

Under the provisions of Section 432 of the Code of Criminal Procedure, the Chief Presidency Magistrate has referred for the opinion of this Court the following question of law:—

"Whether a Special Officer of the Commercial Tax Department who has been empowered in this behalf by the Provincial Government of Madras in exercise of the powers conferred on them by s. 12(3) of the Hoarding and Profiteering Prevention Ordinance introduced by the amending Ordinance No. LIII of 1944, is a police officer within the meaning and for the purpose of s. 162 of Criminal Procedure Code and s. 25 of Indian Evidence Act."

Sub-section (3) of section 12 of the Hoarding and Profiteering Prevention Ordinance was inserted therein on the 13th December, 1944 by the amending Ordinance LIII of that year. The sub-section reads as follows:

"The Controller General and such Inspectors or other Officers as may be empowered by the Central or Provincial Government in this behalf shall, within the respective areas for which they are appointed, have power to investigate all offences punishable under this Ordinance and in conducting any such investigation shall, within the said areas have all the powers duties privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure, 1898 when investigating a cognizable offence within the limits of his station."

Section 162 of the Code of Criminal Procedure states that no statement made by a person to a Police-officer in the course of an investigation under Chapter XIV shall, if reduced into writing be signed by the person making it. The section provides the circumstances in which such a statement can be used. When a witness whose statement has been reduced into writing is called for the prosecution, the Court shall at the request of the accused refer to the writing and the accused shall be furnished with a copy of it in order that any part of the statement, if duly proved may be used to contradict the witness in the manner provided by Section 145 of the Indian Evidence Act. When a part of the statement is so used any other part may be used in the re-examination of the witness, but for the purposes only of explaining any matter referred to in his cross-examination. Sub-section (2) of Section 162 excludes from its operation a statement falling within the provisions of Section 32 (1) of the Indian Evidence Act and does not affect the provisions of Section 27 of that Act.

Section 32 (1) of the Evidence Act relates to a statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Section 27 contains a proviso to Section 25 and Section 26. Section 25 states that no confession made to a Police-officer shall be proved as against a person accused of an offence. Section 26 says that no confession made by a person whilst he is in the custody of a Police-officer, unless it be made in the immediate presence of Magistrate, shall be proved against him. Section 27 says that when a fact is deposed to as discovered in con-

sequence of information received from a person accused of the offence in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Therefore the law places very limited uses on a statement made to a police officer.

Under sub-section (3) of Section 12 of the Hoarding and Profiteering Prevention Ordinance, the Provincial Government have given certain officers of the Commercial Tax Department power to investigate offences under the Ordinance within their respective jurisdiction. In making the reference, the learned Chief Presidency Magistrate has pointed out that ever since the Ordinance has been in force it has been the practice for these officers to begin an investigation after a complaint has been made to them by raiding the place of business of the dealer who is accused of having committed an offence, or any place where goods believed to belong to him are suspected of having been hoarded and seizing such goods and account books. The investigating officer then draws the attention of the dealer to all the circumstances which point towards his guilt and calls upon him to give an explanation. The dealer's explanation is reduced to writing and is signed by him and attested by witnesses. Sometimes the explanation is incorporated in the search list itself. In such a case the dealer may sign a statement prepared by the investigating officer in which he not only acknowledges the seizure of certain articles from his shop or godown, but also confesses that he has given a statement in respect of them. For example, the statement may say that he first told the investigating officer that he had no stock of certain goods, but that on a search being made such goods were found on his premises. It has apparently also been the practice to take similar statements from persons acquainted with the facts of the case and get them to sign their statements. If a witness turns hostile he is confronted by the prosecusion with the statement given to the investigating officer.

If an investigating Officer is a police officer within and for the purpose of Section 162 of the Code of Criminal Procedure this practice is obviously illegal. That he is a police officer within the meaning of the section we have no doubt whatever. Sec. 12(3) of the Hoarding and Profiteering Prevention Ordinance expressly gives him all the powers, duties and privileges of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognizable offence within the limits of his station. Therefore he has the full status of a police officer and his powers and duties must be limited to those of a police officer under the Code of Criminal Procedure, which means that he has no right in an investigation under the Ordinance to require a person to sign a statement and where such a statement is reduced to writing, it can only be used in accordance with the provisions of section 162 of the Code of Criminal Procedure or section 27 of the Evidence Act.

In his statement of the case the Chief Presidence Magistrate has expressed the opinion that if the question is to be answered in the way in which we answer it, it will create insuperable difficulties in making investigations under the Hoarding and profiteering Prevention Ordinance. The Court is not concerned with such difficulties. It can only state the law at the time when this reference was made and the answer to the question referred is that the officers appointed to investigate these offences are police officers within the meaning of the Code of Criminal Procedure and the Code of Criminal Procedure applies to statemens recorded by them.

The learned Crown Prosecutor has drawn our attention to the fact that the Government of India by Ordinance I of 1946 has repealed Ordinance No. LIII of 1944, which means the deletion of Sub-section (3) to Section 12 of the Hoarding and Profiteering Prevention Ordinance. The repealing Ordinance was published in the Fort St. George Gazette on the 22nd January, 1946, the date on which this reference was made. The position is now that investigating Officers under the Hoarding and Profiteering Prevention Ordinance are no longer police officers within the meaningof the Code of Criminal Procedure; but the answer to the reference given applies to all cases which were pending before the repeal of sub-section (3) of section 12 of the main Ordinance.

N.T.R. —

Criminal Revision Case No. 1169 of 1945
(Criminal Revision Petition No. 1085 of 1945)

January 15, 1946

KUPPUSWAMI AYYAR, J.

N. Ramaratnam and another In re.

Penal Code (*XLV of* 1860) *S.* 124-*A—Charge under, in respect of a newspaper article in Tamil—Trial by jury.*

There are several circumstances which have to be taken into consideration before decid-

ing whether a case of sedition under S. 124 A, Penal Code in respect of an article in a Tamil daily having a wide circulation is to be committed to the sessions or to be tried by the magistrate himself. The main test in such a case is the impression formed on the mind of the reader who knows the language in which the article is written. The considerations which ought to weigh are: (1) *The advantages of a trial with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implication and its effect on the general public and the readers' reaction to it.* (2) *The adequacy of the sentence that may have to be passed by the court for the offence in question; and* (3) *the capacity of the judge to appreciate the impression that is likely to be formed in the minds of the reading public.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Chief Presidency Magistrate dated 19-12-1945 and made in C.C. No. 3255 of 1945.

Sir A. Krishnaswami Ayyar, T. M. Kasturi & N. Rajagopala Ayyangar, for Petr.

Crown Prosecutor (*P. Govinda Menon*), for Crown.

ORDER

It is urged for the petitioners that there are various considerations which have to be borne in mind by the Chief Presidency Magistrate before deciding whether he should himself try a case of sedition or should commit it tothis Court for being tried with the aid of a jury and that the Magistrate has not dealt with or considered them before passing the order sought to be revised. In the petition filed before the magistrate, the main point urged was that the offending article being in Tamil, it would be conducive to the ends of justice if the case is to be tried by a jury, a majority of whom would be in a position to decide whether the article was one that would bring, or attempt to bring, into hatred or contempt or excite disaffection against the Government. He has not specifically dealt with this but merely stated that since most of the cases under section 124A, I P C. would be of the same nature as the case before him, and since the law has not made the offence triable exclusively by a Court of Session, it was evident that such cases need not necessarily be tried always by a Sessions Court. The magistrate was perfectly justified in saying that since the legislature has not directed that sedition cases should be tried solely by a Sessions Court, he would be entitled to try it. But then he has not dealt with the grounds urged in this particular case as to why they wanted the case to be tried in this Court with the aid of a jury. As urged by the learned counsel for the petitioners, there are several circumstances which have to be taken into consideration before deciding the question whether this case is to be tried by this Court or by the Chief Presidency Magistrate himself. The main test in such cases is the impression formed on the mind of a reader who knows the language in which the article is written. The mother tongue of the magistrate is Urdu and it is stated that he has passed a test in Tamil and that he has served in Tamil districts. I am not sure whether this knowledge of Tamil would be sufficient to enable him to understand the article with all its implications and to consider and decide what impression it is likely to create upon the Tamil-reading public. Of course he would have the help of the translators, but having read the article myself I think it is a case in which there are a number of points which will have to be taken into consideration and those points will be better considered by persons who know Tamil and who have got a very good working knowledge of that language. A trial of this case with the aid of a jury will, I think, be advantageous not only from the point of view of the accused but also from the point of view of the prosecution.

Apart from this there is also the fact that it is a serious offence with which the accused are charged and it is stated that the paper has a wide circulation. These two grounds were said to constitute enough valid grounds for a case of sedition to be committed to a Court of Session at Bombay instead of being tried by the Presidency Magistrate there. See *Emperor* v. *Krishnaji Prabhakar* (1). *Emperor* v. *Hari Moreshwar* (2) was a case from the mofussil in which the question was whether the accused should be tried by a magistrate or by a Sessions Judge, who would be ordinarily helped only by assessors.

It is also significant that it does not appear from the order of the magistrate that he had occasion to consider about the adequacy of the sentence that could be passed by him nor does it appear from the order that he had come to his conclusion with reference to any information given to him as regards the gravity of the offence or the sentence that

1. (1929) I.L R. 53 Bom. 611
2. (1932) I.L.R. 56 Bom. 61

may have to be imposed on the petitioners. The order is silent on that point.

The main considerations which ought to have weighed with the Chief Presidency Magistrate in this case are:

1. The advantages of trial by a High Court with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implication and its effect on the general public and the readers' reaction to it.

2. The adequacy of the sentence that may have to be passed by the Court for the offence in question; and

3. The capacity of the judge to appreciate the impression that is likely to be formed in the minds of the reading public.

None of these matters have been dealt with and all that is stated is that a case of sedition could be tried by a magistrate as well and all cases of sedition are alike and that therefore he will not be justified in committing the case to the High Court.

The reasons urged for the petitioner in the petition are sufficient to justify the accused being tried not only by a Judge who knows Tamil but also with the aid of a jury who know Tamil, and as this advantage could be had by the accused being committed to this Court if a *prima facie* case is made out, I accordingly find that the magistrate would have done well to have exercised his discretion in recording the evidence as if it was a preliminary enquiry for ultimately committing the case to this Court if a *prima facie* case is to be made out.

It is stated by the learned Crown Prosecutor that the entire evidence has been recorded in writing but that the signatures of the witnesses have not been, obtained as would be necessary in a preliminary enquiry. This defect, as the learned counsel for the petitioner concedes, can be cured by the magistrate sending for the witnesses who are all local men and getting their signatures and certifying that the evidence had been properly read out and explained to them in vernacular and acknowledged by them to be correct.

The petition is accordingly allowed and the magistrate shall proceed with the case in the light of the observation made above.

N.T.R. —— *Petition allowed.*

Criminal Revision Case No. 620 of 1945
(Criminal Revision Petition No. 578 of 1945)

October 30, 1945

CHANDRASEKHARA AIYAR, J.

Valmiganathan, In re.

District Municipalities Act (Mad. Act V of 1920), S. 359—Penal Code (XLV of 1860) S. 323—Obstruction and hurt to municipal servant—Charges.

Where in the course of obstructing a municipal servant in the discharge of his duty, hurt is caused, the assailant can be charged separately for both the offences under S. 359 of the District Municipalities Act and S. 323 of the Penal Code. The offence of hurt is not involved in the other.

There is no legal bar to the magistrate proceeding against the accused on a charge under S. 323 Penal Code, when information is laid before him only for an offence under S. 359, District Municipalities Act.

[1936] *M. W. N.* 181 : *Cr.* 29 : *I. L. R.* 59 *Mad.* 442, Dist.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Kumbakonam dated 12-2-1945 and passed in C.A. No. 1 of 1945 (C.C. No. 861 of 1944. Stationary Sub-Magistrate's Court, Kumbakonam).

M. Srinivasagopalan, for Petitioner.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

Two objections are taken to the conviction in this case. One is that when the accused was charged under section 359 of the District Municipalities Act and fined Rs. 10 for obstructing a municipal servant in the discharge of his duty, the other charge under section 323, I.P.C. for hurt caused to P.W. 1 does not lie. I do not agree. The one offence is not involved in the other; and, if in the course of the obstruction that is offered, hurt is caused, the accused can be charged separately for the two offences. I, however, think that, having made up his mind to proceed against the accused under section 323, it would have been proper for the Magistrate to have dropped the charge under section 359 in the circumstances of this case. For this reason, and not because on any ground of impropriety or illegality, I set aside the conviction and the sentence under section 359 of the District Municipalities Act.

1. (1936) M.W.N. 181: Cr. 29: I.L.R. 59 Mad. 442

It is argued on the strength of the decision in *In re Rajaratnam Pillai* (1) of King, J. that it was not open to the Magistrate to proceed against the accused on a charge under section 323, I.P.C. when information was laid before him only for an offence under section 359 of the District Municipalities Act. This objection is not well-founded. So far as I am able to see, there is no legal bar. What appears to have happened in the case before King, J. is that the Magistrate not only took cognizance of the case as involving an offence under the Railways Act but proceeded with the trial of the case under the procedure laid down for the trial of summons cases and after taking the evidence for the prosecution in full, he converted the proceedings before him from a summons case into a warrant case. That is not what took place here. From the very commencement there was a charge against the accused under section 323, I.P C. and he was tried under the warrant procedure. The conviction under section 323, I P.C. will stand, but I reduce the fine to Rs. 20. Any excess, if paid, will be refunded.

N.T.R.

Criminal Revision Case No. 1054 of 1945
(Criminal Revision Petition No. 988 of 1945)

March 4, 1945

KUPPUSWAMY AYYAR, J.

T. S. Chockalingam Pillai and others, In re.

Defence of India Rules (1939) *Rule* 81 (4)—*Offence under — Not bailable — Criminal Procedure Code* (*V of* 1898) *Schedule II—Criminal Rules of Practice*, *R*. 366.

A case in which a person is prosecuted for an offence punishable under Rule 81 (4) *of the Defence of India Rules is non-bailable as per the second schedule of the Criminal Procedure Code. The offence being non-bailable the magistrate must pay the expenses for the defence witnesses.*

A.I.R. 1944 *Nag*. 149, ref. to.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the 3rd Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, dated 20—11--1945 and made in C. C. No. 400 of 1945.

A. C. Krishnaswami, for Petr.

Crown Prosecutor (*P. Govinda Menon*), for Crown.

ORDER

The only point for consideration in this case is whether the Magistrate was justified in refusing to pay the expenses for the defence witnesses cited in C.C. No 400 of 1945 on the file of the Third Presidency Magistrate, Madras. The petitioner has been prosecuted in this case for an offence punishable under Rule 81 (4) of the Defence of India Rules, which is punishable with imprisonment for a period of three years or fine. The Magistrate has held that this is a bailable offence and that the accused should pay the expenses of the defence witnesses and that the Court will not pay the same. He cites a decision of the Nagpur High Court under the Defence of India Rules in *Ingley* v. *Emperor* [1] for the position that offences punishable under the Defence of India Rules are bailable, and states that as this is a bailable offence the accused himself should pay the expenses for the witnesses under Rule 366 of the Criminal Rules of Practice. That rule specifically provides for the payment of expenses of witnesses by Government in cases shown in the second schedule of the Code of Criminal Procedure as not bailable. The question therefore for consideration is whether a case in which an accused is prosecuted for an offence punishable under rule 81 (4) of the Defence of India Rules is non-bailable as per the second schedule of the Code of Criminal Procedure. The Nagpur High Court has not dealt with the question whether an offence punishable under rule 81 (4) of the Defence of India Rules is bailable or not as per the provisions in the second schedule of the Code of Criminal Procedure. All that is observed by the learned Judge there is that as there is no notification that the offences are not bailable, they must be considered to be bailable and he has not considered with reference to the second schedule of the Code of Criminal Procedure whether such offences are bailable under that schedule or not. The last item in schedule II deals with offences against other laws, that is to say, other than those punishable under the Indian Penal Code and it is stated with regard to such offences that if the offence is punishable with death, transportation or imprisonment for seven years or upwards it is not bailable, that if punishable with imprisonment for three years and upwards, but less than seven, it is not bailable except in cases under the Indian Arms Act, 1878, section 19 which shall be bailable, that if punishable with imprisonment for one year and upwards, but less than three years it is bailable, and that if it is punishable with imprisonment for less than

1. (1944) A.I.R. Nag. 149

one year or with fine only, then also it is bailable. It cannot be said that this is a case in which the offence is punishable with imprisonment for one year and upwards but less than three years because under rule 81 (4) the Court can award on an accused a sentence of three years' imprisonment. In considering the punishment awardable under the rule we will have to take the maximum punishment and if there is a possibility of the accused being awarded three years' imprisonment, then the case will come under the class "If punishable with imprisonment for three years and upwards but less than seven years" and the offence is not bailable. The Magistrate therefore was not justified in treating the case as one in which the accused has been charged with an offence which is bailable. The order of the lower Court refusing to pay the expenses of the defence witnesses on the ground that the offence is bailable and that the Court is therefore not bound to pay under rule 366 of the Criminal Rules of Practice is set aside.

N. T. R. — *Petition allowed.*

Criminal Revision Case No. 1072 of 1945
(Criminal Revision Petition No. 991 of 1945)

February 18, 1946

KUPPUSWAMY AYYAR, J.

S. Pichai Pillai, In re.

Criminal trial—Evidence insufficient—Retrial.

If there is a lacuna in the prosecution evidence, the accused is entitled to have the benefit of the same. The burden is on the prosecution to prove that the accused is guilty and if the evidence is not sufficient to bring the guilt home to the accused, the Court has no other course but to acquit him; even if the offence is a serious one affecting public interest, the court is not justified in directing a trial.

FACTS were as follows: The accused who was the ex-President of the Panchayat Board, Poondi, was convicted by the Sub-Divisional Magistrate, Ariyalur of the offence of criminal breach of trust by a public servant under S. 409, I. P. C. and sentenced to R. I. for six months and a fine of Rs. 150 and in default to suffer R. I. for three months. In the course of the judgment the Sessions Judge said: "The charge against the appellant viz., that he entered only Rs. 60 in Ex. D is not at present borne out by the register itself. If it is the prosecution case that the accused is responsible for those overwritings and alterations, the charge should have been differently framed. As it is, I am of opinion that there is a lacuna in the prosecution evidence and the evidence on record does not warrant the conviction of the appellant. But since the offence in question is a serious one affecting public interest, I am of opinion that a retrial should be ordered."

The present revision was filed against the order for retrial.

Petitions under ss. 435 and 449, Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Trichinopoly division in C. A. No. 56 of 1945 dated 29-9-1945 (C. C. No. 183 of 1944 on the file of the Court of the Sub-divisional magistrate of Ariyalur).

K. Kalyanasundaram & R. Santanam, for Applt.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The learned Sessions Judge considered that on the evidence on record the accused could not be convicted. But at the same time he ordered a retrial because the offence was of a serious nature affecting the public interest and he was of opinion that there was a lacuna in the prosecution evidence. He was not justified in doing so. The prosecution knew what they had to prove, and that they have not proved. If there is a lacuna in the evidence the accused is entitled to have the benefit of the same. The burden is on the prosecution to prove that the accused is guilty and, if the evidence is not sufficient to bring the guilt home to the accused, the Judge has no other course but to acquit him. Even if the offence was a serious one affecting the public interest, he was not justified in directing a retrial.

The order of the Sessions Judge is set aside and the petitioner is acquitted.

N.T.R. —

Criminal Revision Case No. 12 of 1946
(Criminal Revision Petition No. 11 of 1946)
March 14, 1946
KUPPUSWAMI AYYAR, J.

Vempati **Satyanarayana Sastri**
v.
Emperor

Criminal Procedure Code (*V of* 1898), *s.* 107 — *Warning without taking evidence — Setting aside.*

On a complaint of a likelihood of a breach of the peace the Magistrate has no jurisdiction to direct the police to warn the counter-petitioners not to create a breach of the peace, without taking evidence and going into the matter.

Such an order cannot be set aside by the Sessions Judge himself in revision, but the matter must be referred to the High Court.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of Chittoor Division dated 26-11-45 and made in Cr. R. P. No. 6 of 1945 presented against the order of the Court of the Joint Magistrate of Chandragiri, dated 28-6-1945 and made in L. Dis. No. 4532 of 1945.

V. T. Rangaswami Ayyangar & *K. Kalyanasundaram*, for Petr.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

The petitioner filed a petition before the Joint Magistrate of Chandragiri complaining that the counter petitioners and their party had no right to recite *Sankalpam* at the tank at the Thirumalai Hills at Tirupathi and that there was a likelihood of a breach of the peace. Instead of taking evidence and going into the matter the Joint Magistrate directed the police to warn the counter petitoners not to create a breach of the peace by reciting such *Sankalpam*. The matter was taken in revision to the learned Sessions Judge of Chittoor and he set aside the order of warning.

I am not able to see what jurisdiction the first Court had to issue such a warning without taking evidence and deciding whether such a right was there or not. Nor has the learned Sessions Judge any jurisdiction to sit in revision over such an order and pass an order himself. If the order of the Joint Magistrate was wrong, then the Sessions Judge should have written to this Court and asked this Court to interfere. Instead of doing that he has himself set aside the order. This is therefore a case in which both the Courts had no right to pass the orders which they purported to pass. Without taking evidence the Joint Magistrate was not justified in asking the police to warn the counter petitioners. In these circumstances both the orders of the learned Sessions Judge and the Joint Magistrate are set aside.

N.T.R.

Criminal Appeal No. 21 of 1946
March 1, 1946
HORWILL & SHAHABUDDIN, JJ.

The Public Prosecutor
v.
Chitikina **Subbanna** & others

Penal Code (*XLV of* 1860), *Ss.* 34 & 302—*Inference of common intention—Concession by Public Prosecutor as to offence in lower court—Effect—Appeal against acquittal.*

The first and second accused were armed with tapper's knives and the second accused aimed first at the throat of the deceased, while accused 3 *and* 4 *caught hold of him. The third and fourth accused continued to hold the deceased while the first and second accused cut the deceased and this attack continued even after P. Ws.* 2 *and* 3 *attempted to intervene. P. W.* 6*'s evidence showed that the four accused were lying in wait prior to the occurrence.*

Held, *it followed from the evidence that all the accused acted with the common intention to kill the deceased: the fact that the third and fourth accused were not armed did not make any difference and that all the accused were guilty of murder.*

A concession made in the arguments by a Public Prosecutor in a mofussal Sessions Court that the offence would not amount to murder does not amount to his having withdrawn from the prosecution on the charge of murder.

(1931) *M.W.N.* 873 : *Cr.* 193 diss.

It would have been a different matter if the concession had been made at the commence-

ment of the trial or before the evidence was adduced by the accused.

A concession wrongly made on behalf of the accused cannot stand in the way of the appellate court setting aside a conviction based on such a concession; similarly a concession wrongly made by the Public Prosecutor should not stand in the way of an appeal against an acquittal based on that concession being allowed.

Appeal under s. 417 of the Code of Criminal Procedure, 1898, against the judgment of the Sessions Judge of West Godavari at Ellore in Sessions Case No. 9 of 1945 on his file.

Public Prosecutor (*V. L. Ethiraj*), for Applt.
R. Ramalinga Reddy, for Accused.

JUDGMENT

(Shahabuddin, J.)

The respondents who were accused 1, 3 and 4 in Sessions Case No. 9 of 1945 in the Court of Session, West Godavari, were tried with the second accused on a charge under s. 302 I.P.C. read with s. 34, I.P.C. in respect of the murder of one Arupalli Narasimulu. The learned Sessions Judge convicted the second accused of murder and sentenced him to death; and that conviction and sentence were confirmed and his appeal was dismissed by this Court (Referred Trial 156 and Criminal Appeal 552 of 1945). The learned Judge held that the respondents were not guilty of murder. He convicted the first accused of causing grievous hurt and sentenced him to five years rigorous imprisonment and the other two accused of 'wrongful confinement', sentence being one year's rigorous imprisonment each. They have not appealed but the Public Prosecutor, Madras has filed this appeal against their acquittal on the charge of murder.

The case for the prosecution was that early in the morning of the 26th December 1944 while the deceased was taking fodder for his cattle to his field, accused 3 and 4 caught hold of him and accused 2 aimed a blow with a tree tapper's knife at his throat. The deceased put up his left arm to ward off the blow and received on it three cuts. Accused 1 who also had a tapper's knife cut him on the left arm. The deceased raised an alarm as soon as he was attacked and P. W. 2, his brother, who was coming behind him as well as P. W. 3 of the neighbouring field who had joined P. W. 2 on the way came running and tried to intervene, but ran away as the first and second accused threatened to cut them. P. Ws. 4 and 5, who were in the neighbouring fields, also came running and meeting P. W. 2 on the way learnt from him that the four accused were cutting the deceased. When they arrived on the scene, they saw the accused running away. Then they chased the accused for some distance and then returned to the deceased. P. Ws. 6, 7, 9 and 10 also came to the scene of occurrence and to them the deceased Narasimhulu stated that the accused had cut him. The deceased was then taken to the hospital at Achanta, three miles from the scene, which he reached at 9 a. m. There were three injuries on the left arm and one on the right. All of them were incised wounds and one of the injuries on the left arm had cut the brachial artery and vein. Apprehending that this injury might prove fatal, P. W. 1, the doctor, sent for P. W. 12, the village headman who had the dying declaration Exhibit C recorded in his presence by the karnam P. W. 13. In that statement which is attested by the doctor, Narasimhulu implicated the four accused and described the parts played by them in the attack, He said that the third accused caught hold of him, that the second accused came with a tapper's knife, that then the fourth accused also came and caught hold of him that on the second accused attempting to cut his throat with the knife he raised his hands to ward off the blow and received the cuts on his left hand. Then the first accused came and cut him on his right hand and on his raising an alarm, P. W. 3 and others came, and the accused ran away. Narasimhulu died the same day at 6-30 p. m. As already stated one of the injuries on the left arm had cut the brachial artery and vein, The injury inflicted by the first accused on the right arm had resulted in the fracture of the external condyle of the humerus. The post-mortem examination disclosed that death was due to shock and haemorrhage resulting from the injuries.

An hour prior to the occurrence, P. W. 6, while going to his field that morning, saw the four accused together at about 50 yards from the spot where the deceased was attacked; and an hour later he heard the deceased's cry. The accused were not available to the police that day but were arrested in their houses the next day. At about 10 a. m. on the day of occurrence accused 1 and 2 came to P. W. 14 the monigar of Achanta (it appears that there are three village officers besides the karnam for this village) and presented a complaint Ex. K. alleging that that morning while the four accused were in the tope of the first accused (the first accused is a renter of a toddy shop) the deceased, P. W. 2 and the others named in that complaint came in a body, that the deceased cut the second accused

between the left thumb and the forefinger and that P. W. 2 hit the fourth accused with a stick on his back and the third accused on his leg. The others who had come with the deceased and P. W. 2 attempted to attack the accused with knives and sticks and so the accused ran away. There was a minor injury between the left thumb and forefinger of the second accused, which P. W. 14 noticed. P. W. 17 the investigating officer also saw it, but it does not appear that the second accused was sent to the doctor. The injury was a trivial one. There were no injuries on the other accused.

The rest of the evidence relates to the motive for the offence. There was enmity between the first accused on the one hand and the deceased and his brothers on the other due to rivalry in bidding at the toddy sales of 1944. Owing to the competition by the deceased, the first accused had to take the lease of the shop for a far higher amount than usual. P. W. 15, the President of the Panchayat Board of Achanta, deposed that there were criminal cases in his Court between the deceased and some others on the one hand and the first accused on the other. It is alleged in Ex. K that the deceased, P. W. 2 and others were breaking the pots tied to the trees of the first accused. The third and fourth accused are brothers. The first accused is the son of the third accused and the second accused is the son of the fourth accused.

All the accused denied the charge. The first accused stated that he had taken the lease of the toddy shop against the wishes of the Kammas of the village and did not give the usual contribution to the temple. The Kammas, therefore, falsely implicated him. He denied having presented Ex. K. to P. W. 14. The other accused stated that they had been falsely implicated by the Kammas.

On this evidence the Public Prosecutor of West Godavari conceded that in view of the decision of their Lordships of the Privy Council in *Mahbub Shah* v. *The King Emperor* [1], he could not contend that the common intention necessary for the application of section 34 I.P.C. could be inferred. The learned Sessions Judge who believed the evidence referred to above, agreeing with the Public Prosecutor, took the view that the respondents could be held responsible only for their individual acts and convicted and sentenced them as stated already. He observed:

"There is no proof in this case that the criminal act was done in concert by all the accused pursuant to any prearranged plan. It follows, therefore, that each of the accused can be responsible only for the offence committed by him."

The learned Public Prosecutor, Madras contends that it is a necessary inference from the facts proved in this case that all the accused acted in concert in pursuance of a prearranged plan to kill the deceased and that the fact that the Public Prosecutor in the Trial Court made a concession on this point wrongly cannot stand in the way of our considering the question in this appeal. The learned counsel for the respondents relying on the judgment of Reilly, J. in *The Public Prosecutor* v. *Allada Satyam* [2], argues that in view of the concession made in the Trial Court, this Court should not interfere even if it considers that the concession was wrongly made. He contends that the concession made by the Public Prosecutor in the lower Court was not wrong, that even if the evidence for the prosecution is accepted as true, it cannot be said that the first accused, though armed with a tapper's knife, had the intention to kill and that in any event such an intention cannot be imputed to the third and fourth accused. Finally, referring to the evidence of P.W. 13 that the Kammas were on bad terms with the first accused, he argues that it is not safe to rely on the evidence adduced by the prosecution as all the occurrence witnesses except P. W. 2 are Kammas. With regard to P.W. 2, the argument is that he should not be believed as his name does not find a place in the dying declaration. It is said that Ex. K relates to a different incident and not to the incident in which the deceased was injured.

Having been through the entire evidence and having considered the above mentioned decisions, we are of opinion that the contention of the learned Public Prosecutor is well-founded and this appeal must be allowed. In *The Public Prosecutor* v. *Allada Satyam* [2], the accused was charged before the Sessions Judge with murder or culpable homicide. The Public Prosecutor when summing up the case stated that the offence would not come within the scope of murder and this view was accepted by the learned Judge who convicted the accused under section 304 I.P.C. On appeal against the acquittal on the charge of murder, there was a difference of opinion between the learned Judges, Waller, J. taking the view that the offence committed was murder and the appeal should be allowed and Pandalai, J. being of the opinion that the Sessions Judge's conclusion was supportable though not on the ground stated by him. The

1. (1945) M.W.N. 873; Cr. 69 P.C.

2. (1931) M.W.N. 873; Cr. 193

case came before Reilly, J. who while agreeing with Waller, J. that the facts proved by the prosecution established a case of murder declined to allow the appeal because of the concession made by the Public Prosecutor in the Trial Court. He observed that if a Public Prosecutor in a muffusal Sessions Court could withdraw from the prosecution on a serious charge and ask only for a conviction on a minor charge and then another officer representing the Crown could come to this Court and ask for a conviction on the serious charge it would be grossly unfair to the accused as at the end of the trial, his counsel had only to reply to the argument of the Public Prosecutor and at the stage had not to meet the serious charge. If this observation is accepted as correct we should not interfere in this case but with respect, we are unable to agree with the learned Judge. The concession made in the arguments by the Public Prosecutor in that case, it appears to us, did not amount to his having withdrawn from the prosecution on the charge of murder. Nor do we see any prejudice caused to the accused in that case. It is no doubt true that his advocate did not have the opportunity of arguing that the offence made out was only culpable homicide not amounting to murder; but that was hardly necessary as the trial Judge himself was of that opinion, and when the appeal against the acquittal was heard the accused's advocate had the opportunity to argue that point. It would have been a different matter if the concession had been made at the commencement of the trial or before the evidence was adduced by the accused. A concession wrongly made on behalf of the accused cannot stand in the way of the appellate court setting aside a conviction based on such a concession; similarly a concession wrongly made by the Public Prosecutor should not, in our opinion, stand in the way of an appeal against an acquittal based on that concession being allowed. It has been observed by their Lordships of the Privy Council in *Sheo Swarup* v. *King Emperor* [3], that there is no distinction as regards the powers of the High Court in dealing with an appeal between an appeal from an order of acquittal and an appeal from a conviction.

As regards the question of common intention both the Public Prosecutor and the learned Sessions Judge of West Godavari had failed to notice that the facts in *Mahabub Shah* v. *The King Emperor* [1], were entirely different from those of the present case. There, two of the complainant's party were shot at by two of the accused who came on the scene armed with guns to rescue the third accused. One of the men shot at fell down dead while the other was injured. All the three were charged with the offence of murder but only two were tried, as the person who actually fired the shot that killed the deceased, was absconding. The High Court of Lahore acquitted the accused for whose rescue the other two accused who fired the shots came on the scene, but confirmed the conviction of the accused who did not fire at the deceased. Their Lordships of the Privy Council set aside that conviction observing that common intention within the meaning of section 34 I. P. C. implied prearranged plan and that to convict the accused before them it should be found that he fired persuant to the prearranged plan to kill the deceased. Their Lordships further observed that in most cases the prearranged plan has to be inferred from the act or conduct of the accused or other relevant circumstances of the case. In the circumstances of that case, their Lordships were of the opinion that the evidence fell short of showing that the appellant and the absconding accused entered into a pre-concerted plan for bringing about the murder of the deceased. In their Lordships' opinion the only inference justified by the circumstances of that case was that the appellant and the absconding accused shared the intention to rescue the other accused. But in the case before us we feel no difficulty in inferring from the evidence that the accused entered into a prearranged plan to kill the deceased. The mode of attack itself indicates that the four accused were animated with the intention of killing the deceased. The first and second accused were armed with tapper's knives and the second accused aimed first at the throat of the deceased. The third and fourth accused continued to hold the deceased while the first and second accused cut him and this attack continued even after P. Ws. 2 and 3 attempted to intervene. Then there is the evidence of P. W. 6 that the four accused were lying in wait prior to the occurrence. It does not appear that the learned Judge considered this evidence. We therefore consider that if the evidence for the prosecution can be accepted, it clearly follows that all the accused acted with common intention to kill the deceased. The fact that the third and fourth accused were not armed does not make any difference.

It now remains to consider the contention that the evidence should not have been be-

3. (1934) M.W.N. 1017; Cr. 193 : I.L.R. 56 All. 645 P.C.

lieved. It is no doubt true that P.W. 13 has in cross examination admitted that the Kammas of the village were not well disposed towards the first accused; but nothing has been alleged against the witnesses to show that they had any particular reason to be ill-disposed towards the accused personally and to falsely implicate them. It has not been established that any one of the occurrence witnesses was concerned in the bidding at the toddy sales. Day had already dawned by the time the occurrence took place and the deceased and P.Ws. 2, 3, 4 and 5 could certainly have recognised the assailants. It appears to us extremely unlikely that the deceased after having been savagely attacked would have ignored his real assailants and decided, when he must have known that his end was near, to implicate the accused falsely. The fact that the name of P.W. 2 does not find a place in the dying declaration, far from being a point against the prosecution, appears to be one in its favour. It indicates that the deceased stated in that statement all that he could remember at the time. When he was attacked he might not have noticed P.W. 2 though he had come on the scene. The version of the accused in Ex. K renders the story of the prosecution probable. We are unable to find any support for the contention of the learned counsel for the respondents that Ex. K relates to a different occurrence. The fact that no complaint was made to the Village Munsif in respect of the occurrence in question is hardly of any significance. The occurrence took place in the fields and the hospital is in Achanta where the village munsif lives. Taking the deceased to the hospital direct was, in the circumstances of the case, a natural course to follow. Considering the distance of three miles and the time the witnessess must have taken to make arrangements to carry the deceased to the hospital, it cannot be said that there was any avoidable delay.

We consider that the evidence for the prosecution was rightly believed by the learned Judge and that having regard to our observations on the question of common intention, the respondents are guilty of the offence of murder. We therefore set aside their convictions and convict them instead, of the offence of murder.

As for the sentence we should have in the ordinary course imposed on the respondents the extreme penalty of the law, but having regard to the fact that the charge of murder was hanging over their heads for nearly a year and they have been once acquitted, we consider that the lesser sentence would meet the ends of justice. We therefore substitute for the present sentences, the sentence of transportation for life in the case of each of the respondents.

N.T.R.

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Criminal Revision Case No. 544 of 1945
Criminal Revision Petition No. 503 of 1945
February 8, 1946
KUPPUSWAMI AYYAR, J.

V. T. Elaya Pillai & others.
v.
Emperor

Criminal Procedure Code (*V of* 1898), *S*. 214—*Committing Magistrate—Powers of.*

A magistrate who holds the preliminary inquiry can sift the evidence for ascertaining whether a case had been made out and whether the evidence is of such a character as is likely to convince a jury that the offence might have been committed.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sessions Judge of South Arcot dated 9th day of July 1945 and passed in Criminal Revision Petition No. 8 of 1945.

T. R. Venkatarama Sastri & *K. S. Sankara Ayyar*, for Petrs.

Public Prosecutor (*V.L. Ethiraj*), for Crown

ORDER

The petitioners are accused 1 to 7 and 9 in Preliminary Register Case No. 7 of 1944 on the file of the Stationary Second Class Magistrate of Kallakurichi. They, along with three others, were charged with having committed dacoity of groundnuts, transported in bandies and belonging to P.W. 14. The preliminary enquiry was held by the Magistrate, who after sifting the evidence, found that it was not reliable and discharged the accused. The matter was taken in revision to the Court of the learned Sessions Judge of South Arcot. He agreed with the Magistrate with regard to two of the accused and, with regard to these petitioners, he thought that they ought not to have been discharged and that the matter should not have been decided by the Committing Magistrate but should have been left to a jury, with whose assistance the Sessions Judge will be trying the case, if it had been committed to the Sessions. It is to revise that order that this petition has been filed.

It is not disputed before me that a Magistrate, who holds the preliminary enquiry, could sift the evidence for ascertaining whether a case had been made out and whether the evidence is of such a character as is likely to convince a jury that the offence might have

been committed. The order of the learned Sessions Judge, except with regard to one sentence, conveys an impression that he was of opinion that it was for a jury to decide the truth or otherwise in such matters and not for a Committing Magistrate. In this case, the Committing Magistrate has not stated that there is no evidence on which a jury could convict the petitioners but he seems to have felt that the evidence was not of such a character as would justify his committing the case. The learned Sessions Judge observed:

"It would be sufficient to observe that there is enough evidence on record to justify the case being placed before a jury."

If he meant by this that there was enough legal evidence though it may not be acceptable, he was certainly wrong. If he had meant that there was enough acceptable evidence, then he would be right. But then in the next sentence he says;

"It is for a jury to say whether they believe the witnesses or not."

I do not think the Judge was right in saying that it was for a jury to decide about the credibility or otherwise of the witnesses and that the Committing Magistrate had no right to decide that point also. The sentence which expresses his dissent from the Committing Magistrate is this:

"I do not think it would be right to say that the evidence is so manifestly false that no reasonable man would believe it."

If he meant by this that he was of opinion that he was doubtful about the correctness of the finding of the Magistrate on the evidence let in and if he was right he would be justified in having set aside the order of discharge. It was pointed out by King, J. in *Ella Reddi In re* [1] that it is the duty of the Magistrate to weigh the evidence and, if there is a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit it. The question hence here is whether there is any scope for reasonable doubt, or whether that is a case in which the evidence is not of such character as would be proper or safe to rely upon. In *Chandrakasa Malavarayer In re* [2], it was pointed out by a Bench of this Court that it is the duty of the committing magistrate to sift the evidence and see whether it is reasonably clear that upon that evidence the accused persons stand a chance of being convicted. As many as 19 witnesses were examined for the prosecution and about 9 for the defence. The Magistrate has pointed out that the evidence of all these prosecution witnesses who have spoken about the occurence was interested, they being either the servants or dependants of P.W. 14. It is not disputed for the prosecution that there have been ill-feeling and rivalry between P.W. 14 and the first accused. If all the witnesses who have spoken about the occurrence are in one way or other connected with P.W. 14 and if the circumstances of the case disclose the possibility of other disinterested persons—and a large number of them too—having witnessed the occurrence and they had not been examined, these are circumstances to be taken into consideration by the Magistrate as indicating that the evidence is not of an acceptable character.

The offence is said to have been committed at night, openly in the presence of a large body of persons who were with these accused. The carts were stopped. They were asked to proceed to a compound where the bulls were unyoked and the contents of these 17 carts loaded with ground-nuts were taken out. The cartmen were asked to go away, and it is said that they were even offered the cart hire by the dacoits. If that was so, it should have attracted a large crowd and it is in evidence that there are more than 100 houses near the scene of occurrence. None of them have been examined. Apart from this, there is also the fact that all the witnesses, except one, said that it was a dark night. At the same time it was stated that all these 17 carts had each of them a light and that there was a torchlight in the hands of the first accused. If it was dark and there was no light, the witnesses could not have seen the dacoits; and if there were 17 lights, then it must have been possible for all of the witnesses to have seen them all. It is significant, as pointed out by the Magistrate, that no two witnesses are agreed as regards the persons whom they saw. Each gave his own list of persons whom he saw. Further, it is also to be remembered that the attitude of the cartmen, if the evidence is true, was against these dacoits, for they would not even receive the money. It is in evidence that P.Ws. 1 and 2 were asked to go out under the pretext that they had to answer calls of nature and that they went for the purpose of reporting to P.W. 14. If that was so, these victims must have made up their minds to take action, or to get action taken, against these dacoits for what they had done that night. It is also in evidence that there is a police outpost very close to the scene of occurrence, but no complaint appears to have been made, though during the course

1. (1937) M.W.N. 324: Cr. 52
2. (1931) M.W.N. 116: Cr. 12

of the enquiry it was said that an attempt was made to give information at the outpost but there was no one there.

Further, the occurrence was on the 19th night and no information to the police was given earlier than the 24th; *vide* Exhibit C. There was absolutely no justification for this delay. Chinna Salem is within 9 miles of the scene of occurrence and it will not take more than 2 or 3 hours to reach Chinna Salem and give a complaint, even if there was no one at the outpost near the scene of occurrence.

There is one other circumstance which throws considerable doubt as regards the version given by the prosecution, namely, that in Exhibit C, the first information given, which looks as if it had been prepared with care as the names of even the witnesses also are mentioned, there is no mention of accused 4 to 11. Of course, the name of the first accused was mentioned because he is the leader of the party against whom P. W. 14 had a grievance.

Next, it is rather surprising that the stolen articles have not been recovered. The articles that are said to have been taken, are said to be worth Rs. 1,700. It was a large amount for a villager and it is surprising that no attempt was made to seize the articles. During the course of the investigation certain ground-nuts in the railway station yard at Chinna Salem were sought to be identified as the goods that were stolen, but, as pointed out by the Magistrate the attempt was ludicrous. They were able to get only a small quantity of shelled ground-nuts and even the gunny bags were not identified as the bags that were stolen. In a case like this, the first duty of the prosecution would be to get at the articles. especially as they were not articles that can be easily kept hidden. The articles found in Chinna Salem Railway Station were articles purchased by the first accused, and that was made clear by the accounts seized which showed that the first accused had paid money and purchased enough ground-nuts to get the shelled ground-nuts that were found in the railway station. The failure on the part of the prosecution to seize the ground-nuts in time or to take any steps to seize them, is a circumstance which throws a good deal of doubt on the prosecution version.

Further, the evidence as to the *alibi* of the first accused was sought to be corroborated by letters written by him which go to indicate that he had an idea of attending the funeral of his father-in law, before the occurrence. In addition to this, there was the evidence of witnesses who proved that he was there and the village was 60 miles away. Though that by itself would not be sufficient, that is a circumstance to be taken into consideration by a Magistrate and, if the other circumstances are also taken along with this, I think this is a case in which the Magistrate was justified in thinking that the evidence was not of such a character as would be likely to convince a jury about the guilt of the accused. At any rate, there was considerable reasonable doubt about many aspects of the prosecution evidence on which the accused would be entitled to the benefit of the doubt, which rightly influenced the Magistrate in coming to the conclusion that he should not commit the accused to the Sessions, and I do not think he was wrong.

It is rather unfortunate that the learned Sessions Judge has not discussed any of these points. He simply noted that it would be embarrasing if he were to discuss them. What was in the mind of the Judge is not clear, if he only meant that it was not the duty of a committing Magistrate to sift the evidence to see if it was acceptable or not, he is wrong. But if he was of opinion that his appreciation of the evidence was incorrect, he has not indicated it in his order. The Magistrate has dealt with the case in all its details and, having read his order, I do not think I will be justified in differing from him in his appreciation of the evidence.

This is a case in which there is a good deal of doubt as regards the truth of the evidence of the prosecution witnesses on various points. There has been delay not only in investigation but also giving the first information to the authorities. The stolen articles have not been seized. In addition to all these, the names of as many as 8 accused persons had not been mentioned in the first information report given some days after the occurrence. When all this is borne in mind and if the evidence is sifted in the light of these facts, I think the Magistrate was right in thinking that there was not enough reliable evidence that the accused were guilty.

The order of the learned Sessions Judge, setting aside the discharge of the petitioners is cancelled and the order of the Magistrate, discharging them, will be restored.

N.T.R. —

Criminal Revision Case Nos. 574 & 575 of 1945
Cr. Revision Petition Nos. 533 & 534 of 1945
January, 7, 1946.
KUPPUSWAMI AYYAR, J.
A. Perayya and others
v.
Emperor

Gaming Act (*Madras Act III of* 1930), *S.* 5—*Warrant under—Requisites.*

S. 5, *Gaming Act, does not state that the Magistrate should record what the materials were on which he was asked to issue the warrant or whether he believed them to be true or not. The warrant cannot be said to be invalid merely because these particulars are not stated.*

A Magistrate should be presumed to have known what the requirements are before he could issue the warrant and also that he would not have issued the warrant unless he had been satisfied on the information supplied to him that it was necessary to issue the warrant.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional 1st class Magistrate of Anantapur dated 26—3—45 and passed in Criminal Appeals Nos, 2, 3 and 5 of 1945 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Dharmavaram dated 18—12—1944 and passed in calender case Nos. 390 and 391 of 1944.

A. Bhujanga Rao, for Petr.
Public Prosecutor (*V.L. Ethiraj*), for Crown

ORDER

The main point in both these revision petitions is whether the search warrant was properly issued. What is stated is that in the warrant it is not stated what the materials were on which the Magistrate came to the conclusion that it was a case in which a warrant should be issued and it is also stated that the magistrate has not stated therein that he has reason to believe that the place was used as a gaming house.

Two authorities are cited, one for the petitioner and another by the learned Public Prosecutor. The one relied on by the petitioner is reported in *In re Thambi Ayyangar and others* [1]. In that case, there was no other evidence except the presumption sought to be raised under section 6 of the Gaming Act. The other to the contra is a decision of Burn, J. in *Naranappayya* v. *Emperor* [2]. It is not necessary to refer to either of these decisions. In this case the warrant purports to be issued by a second class magistrate under s. 5 of the Gaming Act. A magistrate should be presumed to know law and also must be presumed to have known what the requirements are before be could issue the warrant. S. 5 does not state that the magistrate should record what the materials were on which he was asked to issue the warrant or whether he believed them to be true or not. As already stated in this case the warrant purports to be issued under s. 5. The magistrate would not have issued the warrant under this section unless he had been satisfied on the information supplied to him that it was necessary to issue the warrant. If these presumptions are drawn, then the warrant cannot be said to be invalid merely because of the fact that what the information was on which he was asked to issue the warrant was not stated. If the warrant is therefore validly issued, then the presumption naturally follows under s. 6 of the Gaming Act that the place was used as a common gaming house and that the persons found therein were there present for the purpose of gaming and this will be enough to justify the conviction.

It is next urged that the evidence in one case has also been used in the other. The two cases were tried together and a common judgment has been written. It would have been better if the magistrate had referred only to the evidence in each case and written separate judgments. But then it is only an irregularity. The presumption that he could draw under section 6 is the main material on which the judgment has been based. Further there was also the evidence of the Circle Inspector and he had stated what the materials were. He has also stated that he believed the information to be true. In these circumstances I will not be justified in failing to draw the presumption under section 6 and if this is drawn, then these petitions will have to be dismissed. I do not think this is a case in which I will be justified in interfering with the sentence.

The petitions are accordingly dismissed.

N.T.R. —— *Petition dismissed*

1. [1945] M.W.N. 771 (1): Cr. 138 (1)
2. [1938] M.W.N. 319: Cr. 51

Criminal Appeal No. 85 of 1945
April 26, 1945
HAPPEL, J.
The Public Prosecutor, Madras
v.
Venkadari Naga Pulliah Chetti

Prevention of Food Adulteration Act (*Mad. Act III of* 1918), *Section* 6 (2) (*a*)—*Defence under.*

Save as otherwise provided under sub-section. (2) *of Section* 6, *it is no defence to a prose-*

cution for an offence under Section 5 of the Prevention of Food Adulteration Act, to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him. The warranty referred to in Section 6 (2) (a) (i) must be a "written warranty in the prescribed form". A label or cash bill does not amount to a warranty within the meaning of Section 6 (2) (a).

Appeal under Section 417 of the Code of Criminal Procedure, 1898, against the acquital of the aforesaid Respondent (Accused) by the Stationary Sub-Magistrate of Nandyal in C.C. No. 553 of 1944 on his file on 23-10-1944.

Assistant Public Prosecutor, for Applt.

A. Gopalacharlu & T. V. Subba Rao, for accused.

JUDGMENT

This is an appeal by the Provincial Government against the acquittal of the accused in C.C. No. 553 of 1944 in the Court of the Stationary Sub Magistrate of Nandyal. The accused is a shop-keeper and he had in his shop some tins labelled "Sri Sai Coffee Tablets", "pure coffee 50 percent and roasted coffee husk 50 per cent". He sold some of these tablets to the Sanitary Inspector of Nandyal Municipality on the 13th May 1944 and, on analysis, they were found to contain not 50 per cent of coffee and 50 per cent of roasted coffee husk but 15 per cent of coffee and 85 per cent of some other substance referred to as imitation coffee which contained no coffee husk. On the footing of this analysis he was prosecuted for an offence punishable under section 5 (1) (a) and (d) of the Madras Prevention of Adulteration Act 1918 read with rules 36 (b) and 40 framed under the Act. On receiving a notice of the summons the accused sent to the local executive officer a copy of the cash bill which he had received in respect of the tin of coffee and husk with the written notice required under the first proviso to section 6 (2) (a) of the Act that he intended to rely on it. The Stationary Sub Magistrate found that the cash bill was not a warranty within the meaning of section 6 (2) (a), sub-section (1) but, nonetheless, rather surprisingly acquitted the accused on the ground that he was not responsible for the alleged adulteration and that he sold the tablets in the same condition as that in which he received them from D. W. 1. The defence accepted by the Magistrate is a defence expressly exculded under section 6 sub-section (1) of the Prevention of Adulteration Act which states that save as otherwise provided under sub-section (2), it shall be no defence to a prosecution for an offence under section 5, to allege merely that the vendor was ignorant of the nature, substance of or quality of the food sold by him, etc. Learned counsel for the accused does not support the reasoning of the magistrate, but he argues that the cash bill taken with the label were themselves sufficient warranty within the meaning of s. 6 (2) (a)(1). This contention obviously cannot be accepted as the warranty referred to in s. 6 (2) (a) (1) is by the terms of the section itself "a written warranty in the prescribed form". A label or cash bill of course is not a written warranty in the prescribed form. The accused therefore clearly committed the offence with which he was charged under sec. 5 (1) (a) and (d) of the Act read with rules 36 (b) and 40.

The order of acquittal passed by the magistrate is therefore set aside and the accused is convicted of the offence charged. In the circumstances it does not seem to me necessary to pass anything but a nominal sentence. I accordingly sentence the accused to pay a fine of Rs. 5 or, in default of payment, to undergo One Week's Simple Imprisonment.

N T.R.

Cr.R.C. No. 455 of 1945

(Cr.R.P. No. 418 of 1945)

February 8, 1946

KUPPUSWAMI AYYAR, J.

P. Kuttiali and another **In re**

Madras Rationing Order, 1945 Cl. 7 — Rationed article—Meaning of.

The scheme of the Rationing Order indicates the it was intended to prevent unrestricted purchases and sales in the ration area, Therefore purchases and sales in the ration area were intended to be covered, even though the purchases were made by persons living outside the ration area and for use outside the ration area.

The question whether an article is a 'rationed article' or not is to be determined with reference to the nature of the article and not with reference to the area in which it is to be used or consumed.

Petition under Section 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the order of the Court of Session of the North Malabar division da ed 3-2-1945 and made in Criminal Appeal 48 of 1944 (C. C. 122 of 1944 on the file of the Court of the Joint Magistrate Tellicherry).

B. Pocker, for Petrs.

Public Prosecutor, (*V. L. Ethiraj*), for Crown.

ORDER

The petitioners have been convicted by the Joint Magistrate of Tellicherry and sentenced

to pay a fine of Rs. 1000 on each count in respect of purchases made by them of paddy and rice, in contravention of clause 7 of the Madras Rationing Order. Both the Courts have found that they did purchase and that they committed the offence.

What is urged before me is that the expression "rationed article" must be understood with reference to the use to which the article was to be put and not with reference to the place of the transaction in respect of the articles. The persons who are said to have purchased the articles are persons living outside the ration area, but the transaction took place within the rationed area. The object of the order is to prevent the violation of the rationing orders. The scheme of the order clearly indicates that it was intended to prevent unrestricted purchases and sales in the ration area. Therefore, purchases and sales in the rationed area were intended to be covered. This is a transaction of sale and purchase made in the rationed area. The question whether the article is a "rationed article" or not is to be determined with referrence to the nature of the article and not with reference to the area in which it is to be used or consumed. I do not therefore think that I will be justified in accepting the contention of the petitioners that these are not "rationed articles" that were purchased. They were "rationed articles" that were purchased and they were purchased in a rationed area, and the petitioners were therefore rightly convicted.

The petitioners' plea was that they never committed the offence and they never purchased the articles. Both the Courts have believed the evidence of the cartmen and I do not think I will be justified in interfering with the appreciation of the evidence of two Courts.

With regard to the sentence, the Magistrate has stated that an exemplary punishment has to be given because the quantity of the articles purchased indicated that they were intended for use on the black market. The petitioners are residents of Kallai and it is not the prosecution case that they are trading in a rationed area. Therefore, from the quantity purchased, no inference could be drawn that they intended to trade in black market. The reason given for examplary punishment therefore fails. I therefore reduce the sentence to a fine of Rs. 100 in respect of each count, taking into consideration the fact that these persons, being outside the rationed area, could have *bona fide* thought that they could make these purchases because the articles were intended for sale outside the rationed area and that no offence with regard to rationing was likely to be committed by such purchases.

N.T.R.

Criminal Revision Case No. 375 of 1945
(Criminal Revision Petition No. 350 of 1945)

February 8, 1946

KUPPUSWAMI AIYAR, J.

Sala Mahammad In re

Madras Rationing Order, 1945, *Clause* 4—*Offence under—Rationed article—What is.*

The scheme of the Rationing Order indicates that it deals only with transactions in respect of rationed articles which are sold and purchased in the rationed area. It has reference only to the sale or purchase of the articles and not the user.

Hence a wholesale dealer in paddy and rice in a rationed area who is not an authorised distributor under the Rationing Order selling paddy to persons living outside the area for use outside the rationed area is guilty of an offence under clause 4 of the Rationing Order read with R. 81 (4), *Defence of India Rules.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, North Malabar division, dated 3-2-1945 and made in Criminal Appeal No. 47 of 1944 (C. C. No. 120 of 1944 on the file of the Court of the Joint Magistrate, Tellicherry).

V. Rajagopalachari for Petr.

Public Prosecutor (*V.L. Ethiraj*) for Crown.

ORDER

The petitioner has been sentenced to pay a fine of Rs. 10,000 for having contravened the provisions of the Madras Rationing Order, clause 4, read with Rule 81 (4) of the Defence of India Rules. He is a wholesale dealer in rice and paddy at Tellicherry, and the contravention consisted in selling paddy to two persons in Kallai, outside the Municipal limits of Tellicherry, and he is said to have contravened by the sale, the provisions of clause 4 of the Madras Rationing Order, which runs thus:

"No person other than an authorised wholesale distributor, an authorised retail distributor, or an authorised establishment shall, on or after the rationing date, supply or offer or attempt to supply to any person any rationed article."

In this case, it is not disputed that he is a person other than "an authorised wholesale distributor, an authorised retail distributor, or an authorised establishment." No doubt, he has a licence to sell paddy and rice, but then the expression "authorised wholesale distributor" is defined in the order as a person with an authorisation in respect of a "rationed article." "Rationed article" is defined to be

"any article which the Provincial Government may by notification in the Official Gazette in respect of any rationed area specify in this behalf." Rice and paddy, that were sold, are rationed articles in Tellicherry town, where the sale is said to have been effected. But the petitioner has not obtained the permit entitling him to sell in the area any rationed article. Therefore he is not an "authorised wholesale distributor" as defined in the order. Such a person shall not sell or offer or attempt to sell to any person any rationed article. The expression used in the order is "any person" and not merely "a person living in the rationed area". So the petitioner is a person other than an "authorised wholesale distributor". as defined in the Order, and he has sold to a person paddy, which is admittedly a rationed article.

But what is urged before me is that an article will be a "rationed article" only if it is to be sold for use in a rationed area, and, if it is to be used or dealt with in a place other than the rationed area, it will not be a 'rationed article". I do not think that I will be justified in accepting this contention, for, then we would have had, instead of the expression "any person", this description, namely, "a person living in the rationed area requiring the article in the rationed area", which is not there. Therefore, the participle "rationed" must be understood as referring to the article and not to the use to which it is put or the place where it is to be used. The scheme of the Rationing Order clearly indicates that it deals only with transactions in respect of rationed articles which are sold and purchased in the area. Therefore, it has reference only to the sale or purchase of the articles and not the user. If this is so understood, the petitioner is guilty

As regards the sentence, the petitioner has been sentenced to pay a fine of Rs. 10,000. I should think it is excessive. It is not necessary to give an exemplary punishment for this reason. This firm has been supplying articles, —even rationed articles – not only to persons in Tellicherty but also to persons living outside. In this case, the persons, to whom the paddy was supplied, are living outside the rationed area, and they are persons who have been purchasing for use outside the area. Consequently, the purchase was made *bona fide* and in these circumstances the fine of Rs 10,000 is excessive and I accordingly reduce it to Rs. 500.

N.T.R.

Crl. M. P. No. 1211 of 1945

January 16, 1946

KUPPUSWAMI AYYAR, J.

Kunju Iyer *In re*

Cr. P. C. (V of 1898), *S.* 403 (1)—*Conviction under s.* 409 *I. P. C.—Acquittal on appeal aad remand for trial under s.* 420 *I. P. C.—Legality,*

Petitioner was convicted by the joint magistrate for an offence punishable under s. 409 *I. P. C. On appeal the Sessions Judge was of opinion that the facts alleged did not constitute an offence punishable under s.* 409 *and accordingly acquitted ihe petitioner, but directed that the papers be sent to the lower court for a charge being framed under s.* 420 *and evidence being let in.*

Held, *that the trial for the offence under s.* 420 *was not barred by s.* 403, *Cr. P. C.*

(1936) *M.W.N.* 281, *Cr.* 49, distinguished.

Petition praying that in the circumstances stated therewith the High Court will be pleased to quash the proceeding in C. C. No. 533 of 1944 on the file of the Court of the Additional First class Magistrate, Coimbatore.

T. M. Kasturi, for Petr.

Assitant Public Prosecutor (*A. S. Sivakaminathan*) for Crown.

ORDER

The petitioner was convicted by the Joint Magistrate of Pollachi for an offence punishable under section 409 of the Indian Penal Code. On appeal the learned Sessions Judge was of opinion that the facts alleged did not constitute an offence punishable under section 409 and accordingly acquitted the petitioner, but directed that the papers be sent to the lower Court for a charge being framed under section 420 and evidence being let in. It is urged before me that the proceedings should be quashed in view of the provisions of section 403 of the Code of Criminal Procedure. Sub-section (1) of that section runs thus:

"A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.'.

In this case it is not disputed that the first Court itself could have convicted the petitioner for an offence punishable under section 420 even though no charge under that section had been framed: It is hence stated that this is a case in which he should have been convicted by reason of the provisions of s. 237 of the

Code of Criminal Procedure and therefore the acquittal in this case would be a bar to a further trial in respect of an offence under s. 420 of the Indian Penal Code. What was done in this case was that instead of the appellate Court itself finding him guilty under s. 237, it wanted to give an opportunity to the petitioner to have a fresh trial after framing a fresh charge and let in evidence and that was within the powers of the Court. What has been done was the exercise of the powers under s. 237 with this addition, namely, that certain privileges were sought to be given to the accused by ordering a fresh charge to be framed and a fresh trial. The appellate Court as a Court of error found that the first Court had committed a mistake in convicting the petitioner of an offence punishable under s. 409 and at the same time exercised the powers which the first Court could have exercised if it had itself noticed the error and acted. I hence do not think this is a case of a fresh prosecution or a fresh trial. When the error was noticed by the Court, it corrected the error and exercised the same powers as the first Court could have exercised if it had noticed the error.

My attention is drawn to the decision in *Rex* v. *John McIver* [1]. But that case has no application to the facts of this case, at any rate that case can be distinguished from the present case. In that case there was an acquittal by reason of compunding and the matter rested there. It was taken in appeal and the appellate Court confirmed the order and it did not interfere. But after having accepted the acquittal, the Court directed on the same facts a prosecution for a different offence because that was prayed for in the original complaint. That was sought to be prohibited by section 403 of the Code of Criminal Procedure, whereas in this case the case had not come to an end. The case ended in a conviction which was upset by the appellate Court. While acquitting the petitioner, the appellate Court acting under s. 237 observed that the alternative charge should be inquired into. I therefore do not think the decision in *Rex* v. *John McIver* (1) applies to the facts of this case. In these circumstances I do not think I will be justified in interfering with the order of the appellate Court and quashing the further proceedings.

The petition is dismissed.

N.T.R. —— *Petition dismissed.*

1. (1936) M.W.N. 281 : Cr. 49

Cr.R.C. No. 1128 of 1945
(Cr.R.P. No. 1044 of 1945)
March 7, 1946

KUPPUSWAI AYYAR, J.

Jaladu Manikyala Rao and others
v.
Nimmagadda Venkatappayya

Criminal Procedure Code (V of 1898), s. 145 —Party, if can be compelled to appear.

A magistrate connot compel parties in proceedings under s. 145 of the Criminal Procedure Code to appear in court, especially where by the preliminary order they have been permitted to appear either in person or by pleader. It may been open to him to summon them as witnesses if they are wanted as court witnesses or witnesses for the other side.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional I class Magistrate of Masulipatam dated 2-10-1945 and made in M. C. No. 9 of 1945.

S. Kothandarama Nainar for Petrs.

P. Sivaramakrishnayya & K. Bhimasankaran for Respt.

Public Prosecutor (V. L. Eithiraj) for Crown.

ORDER

This is a petition to revise the order of the Additional First Class Magistrate of Masulipatam dismissing the petition of the petitioners stating that they cannot be compelled to execute bonds for appearance and that they cannot be compelled to appear in Court merely because they happen to be parties to proceedings under s. 145 of the Code of Criminal Procedure. I do not think the Magistrate was right in saying that he can compel parties in proceedings under s. 145 to appear in Court. It may be open to him to summon them as witnesses if they are wanted either as court witnesses or witnesses for the other side. But then they will be attending Courts as witnesses and not as party. Even under the preliminary order it is stated that the respondents were to appear either in person or by pleader. The Magistrate himself had permitted them to appear by pleader and that order has not been cancelled. The Magistrate therefore was not justified in insisting upon the attendance of these petitioners if they are not willing to appear in court but are content with appearance by pleader. Further if they do not appear and let in evidence, then the case will be disposed of *ex parte* after taking the evidence that may be let in by the other side. In these circumstance the order of the Magistrate insisting

upon their appearing in person and executing bonds is incorrect and is therefore set aside.

N.T.R

Cr. App. No. 928 of 1945

March 25, 1946

KUPPUSWAMI AYYAR, J.

Asuram and others

v.

Emperor

Hoarding & Profiteering Prevention Ordinance (XXXV of 1943) *Sections* 9 & 13—*Refusal to sell—When offence.*

Before persons can be convicted under the Hoarding and Profiteering Prevention Ordinance, for refusal to sell a particular article, it must be proved that the accused were dealers, that is were carrying on business of selling that article.

Appeal against the order of the Court of the Chief Presidency Magistrate of Egmore, Madras, in C. C. 1275 of 1945 dated 21 December 1945,

V. Rajagopalachari & T. A. Rajagopalan for Applts.

Crown Prosecutor (*P. Govinda Menon*) for Crown.

JUDGMENT

The 13 accused before Court who were trading as partners in stationery articles and other sundry articles have been convicted by the Chief Presidency Magistrate, Madras, for an offence punishable under Sections 9 and 13 of the Hoarding and Profiteering Prevention Ordinance.

The case against them was that they had stock of camphor and refused to sell when two customers came and wanted to purchase it. The appellants' case is that they were not dealers in camphor, that therefore they told the customers that they were not dealing in camphor and had no stock for sale. Evidence has been let in that in a room in which they had their stock, camphor was found in some unopened packets. The appellants admitted that two persons came and asked for camphor, and that they told them that they had no camphor for sale as they were not dealing in it. There is no evidence to show that the appellants were dealers in camphor. The word "dealer" has been defined under Section 2 (d) of the Hoarding and Profiteering Prevention Ordinance as a person carrying on business by selling any article whether wholesale or retail. There is absolutely no evidence to show that these appellants were carrying on trade in camphor at any time. As a matter of fact, four persons were examined to show that they were not dealing in camphor and they had not been cross-examined by the prosecution. The only evidence is that in a room in the building in which they had stock, camphor was found. Unfortunately the appellants tried to let in evidence to show that this camphor belonged to D. W. 5 which has been rightly disbelieved by the Magistrate, and there is also evidence that the packets in which camphor was kept showed that they were despatched from Bombay to Madras by the first appellant to his own address. But that will not help the prosecution because it will only show that the first accused was in possession of camphor obtained by him from Bombay. The charge is not for being in possession of camphor but for refusing to sell camphor when it was demanded. If the appellants are not dealers as defined under the Ordinance, then they are not liable to be punished for the offence with which they have been charged.

I therefore set aside the convictions and sentences and acquit the appellants. The fine, if already collected, will be refunded.

N.T.R.

Cr. M. P. No. 1300 of 1945

January 18, 1946

KUPPUSWAMI AYYAR, J.

Palaniswami Goundan

v.

Emperor

Cr. P.C. (*V of* 1898) *S.* 173—*Supplementary charge sheet, if can be filed.*

A police officer, who had filed what is styled as a 'final charge sheet' in which he has not laid a charge against one of several persons against whom information was received by him at the earliest stage of investigation, could file a further charge sheet against that person without disclosing that he had received any further information.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings in C.C. No. 172 of 1945 on the file of the Court of the Additional 1st Class Magistrate, Erode.

K. S. Jayarama Ayyar & C. K. Venkatanarasimhan, for Petr.

Public Prosecutor (*V. L. Ethiraj,*) for Crown.

ORDER

The only point for consideration in this case is whether a police officer, who had filed what is styled as a 'final charge sheet' in which he has not laid a charge against one of several persons against whom information was received by him at the earliest stage of investigation, could file a further charge sheet against that person without disclosing that he had received any further information. No authority has been cited for the contention

that such supplementary charge-sheet cannot be laid. All that the section says is that the final charge sheet shall be filed after the investigation is closed, but there is nothing said in the Code as to when the investigation is to be considered to have ended. If a police officer after he lays a charge, gets information, he can still investigate and lay further charge sheets; and so there is no finality either to the investigation or to the laying of charge sheets in the sense in which it is sought to be understood in this case. I therefore do not think I will be justified in quashing proceedings. The petition is accordingly dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 678 of 1944
Cr. R. P. No. 641 of 1944
November 30, 1944
HAPPELL, J.

Chittoori Potharaju
v.
Emperor

Hoarding and Profiteering Prevention Ordinance (XXXV of 1943), *sections* 6 (1) & 13 (1)—*Deductions permissible from sale price.*

In calculating the 20 *per cent profit which a seller can charge above the cost of production, he is not entitled to deduct from the sale price overhead charges and so forth.* 20 *per cent profit is intended to cover such charges. Nor is he entitled to deduct a tax which is paid by the purchaser.*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the judgment of the Court of Session of Kistna Division at Chilakalapudi dated 26th August 1944 in C.A. 65 of 1944 (C. C. 7 of 1944 on the file of the Court of the Additional District Magistrate, Kistna.)

K. S. Jayarama Ayyar & *P. Suryanaraaana,* for Petr.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

The petitioner has been convicted of a contravention of the Hoarding and Profiteering Ordinance and has been sentenced to undergo rigorous imprisonment for one month and to pay a fine of Rs. 150 on the footing that the sale by the petitioner of his beedies at a price more than 20 percent above the price for which they were purchased amounted to offences under sections 6 (1) and 13(1) of the Ordinance. The prosecution case was that the petitioner had sold a bundle of one type of beedies at a price which was 41 percent more than the purchase price and another bundle of beedies at a price which was 25 percent above the purchase price. The arithmetical calculations made by the lower court are correct and although there is no evidence with regard to the cost of production the assumption that the wholesale purchase price would, at any rate, not be below the cost of production is justified. I do not accept the contention advanced for the petitioner that he was entitled to deduct from the sale price overhead charges and so forth. 20 per cent is a profit which is clearly intended to cover such charges, nor do I accept the argument that he was entitled to deduct the tobacco tax. Tobacco-tax is paid by the purchaser and so far as appears from the evidence the sale prices of Rs. 3 and Rs. 2—8—0 excluded the tobacco-tax. The last argument advanced that the criterion of unreasonable profit should not have been 20 percent above the cost of production but the profit allowed by the normal trade practice also has no substance. The prosecution was brought on the footing that the offences were committed because the sales gave a profit of more than 20 percent above the cost of production and if there was a normal trade practice of a profit greater than this, it should have been pleaded by the petitioner and he should have proved it. The convictions were therefore correct. This does not, however, seem to be a very gross case of profiteering and I think consequently that the ends of justice will be met if the sentence of imprisonment is reduced to the period already undergone while the sentence of fine is confirmed. In other respects the petition is dismissed.

N.T.R. —

Crl. R. C. No. 936 of 1945
(Crl. R. P. No. 876 of 1945)
March 8, 1946
KUPPUSWAMI AIYAR, J.

D. Narayana Singh
v.
Nalluri Seetharatnamma

Criminal Procedure Code (*V of* 1898), *Section* 253 (1)—*Discharge under—When to be made.*

A Magistrate has no power to pass an order of discharge under section 253 (1), *Criminal Procedure Code, until he has examined all the witnesses cited.*

4 *Mad.* 329 followed.

Petition under sections 435 and 439, Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate, Kistna, dated 26-6-1945 in Cr. M. P No. 26 of 1945 preferred to revise of the order of the Court of the Joint Magistrate of Bezwada in C. C. No, 50 of 1944.

V. T. Rangaswami Ayyangar, for petr.

K. S. Jayarama Ayyar & *K. Ramaseshayya Chowdari* for Respt.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

This is a petition by the complainant in C.C. No. 50 of 1944 on the file of the Joint Magistrate of Bezwada. He filed a complaint for cheating against one Sitaratnamma, an offence punishable under s. 420. Indian Penal Code. His case was, that the accused took jewels from his wife representing that they were required for taking the photograph of a girl who was about to be married and that the jewels were given to her but not returned subsequently though she was requested to return the same. A number of witnesses were cited and it was stated that three persons were present at the time of the delivery of the jewels. The Magistrate took evidence and also examined a Court witness but passed an order of discharge on the evidence taken by him without examining the investigating officer and one of the persons cited as a witness to prove the delivery of the jewels to the accused. He discussed the evidence and passed an order discharging the accused under s. 253 (1), Criminal Procedure Code. He definitely states: "I therefore discharge the accused under the provisions of s. 253 (1) of the Criminal Procedure Code." The Magistrate had no power to pass an order under s. 253 (1) until he has examined all the witnesses. This has been pointed out by this court in *The Queen* v. *Parasurama Naicker* (1). When the matter was taken in revision to the Additional District Magistrate, he was of the opinion that the Magistrate committed an error and that what he must have meant was that he was discharging the accused under s. 253 (2), and then dismissed the petition. I do not think there is any justification for thinking that the Magistrate intended to discharge under s. 253 (2) when he specifically stated that he discharged under s. 253 (1). The evidence has been appreciated no doubt on the basis that all the evidence was over. We cannot say what conclusions the Magistrate would have come to if he had also examined the other witness to prove the delivery of the jewels. As a matter of fact the accused's case was that the jewels were not received by her. In these circumstances I do not think the Additional District Magistrate was justified in treating the order as one passed under s. 253 (2) and proceeded to appreciate the evidence and infer that the Magistrate would have come to the same conclusion even if he had examined the other witness. I therefore set aside the order of discharge and remand the case to the Joint Magistrate of Bezwada for proceeding with the case after examining the two other witnesses who have not been examined, namely, the investigating officer and the other witness who is to prove the delivery of the jewels to the accused.

1. 4 Mad. 329

N.T.R.

—

L. P. App. No. 70 of 1945

March 12, 1946

Sir Lionel Leach, C.J. &

Lakshmana Rao, J.

Mokshagundam Nagabhushanayya and others

v.

Pasam Kottayya and others

Limitation Act (*IX of* 1908), *Article* 47—*Starting point under*—*Criminal Procedure Code* (*V of* 1908), *sections* 145 & 439—*Order in revision*—*Nature of.*

Plaintiff and defendants 1 *to* 5 *were owners of a parcel of land in respect of which there were proceedings under s.* 145 *Criminal Procedure Code. As the result of the inquiry the Magistrate held that the sixth defendant was in possession and passed an order under s.* 145 (6) *on* 16-1-1939. *The plaintiff was not a party to the proceedings under section* 145. *Defendants* 1 *to* 5 *filed an application to the High Court asking for revision of the magistrate's order. This application was rejected* in limine *on* 15-8—1939. *Plaintiff filed the present suit for possession on* 26-5-1942.

Held *that the order of the magistrate under s.* 145 *not having been modified by the High Court in revision, it was the final order within the meaning of article* 47 *Limitation Act, and that the suit was out of time so far as defendants* 1 *to* 5 *were concerned.*

39 *Mad* 1196, followed.

An order dismissing in limine *an application for revision of an order passed under s.* 145 (6) *Criminal Procedure Code is not a final order within the meaning of Article* 47 *of the Limitation Act.*

S. 440 *Cr.P.C. expressly states that no party has any right to be heard either personally or by pleader before any court when exercising its powers of revision. Therefore when a petition for revision is presented, it is open to the judge before whom it comes to read it through and, if he thinks fit, he can dismiss it without hearing any one.*

The fact that the advocate who presented the petition was heard makes no difference to the effect of the order of dismissal.

There is no analogy between a criminal revision petition which is dismissed in limine *and an appeal. The order dismissing a revision application* in limine *does not mean the substitution of the order of the High*

Court for the order of the Magistrate and therefore it cannot be said to incorporate his order.

S. 145 Cr.PC. contemplates two orders, a preliminary order under sub-section (1) and a final order under sub-section (6). Article 47 Limitation Act applies to the second order. If the application for revision is accepted and the magistrate's order is set aside, his order is no longer the final order; but until it is set aside or modified, it is.

Appeal against the judgment and decree of the Honourable Mr. Justice Happell dated 12-7-1945 and passed in S.A. No. 2072 of 1944 preferred against the decree of the court of the Subordinate Judge of Kurnool in Appeal Suit No. 16 of 1944, preferred against the decree of the Court of the District Munsif of Markapur in Original Suit No, 229 of 1942.

K. Kotayya, for Applts.

K. Subba Rao, P. Ram Reddi & K. Ramamurthi, for Respts.

JUDGMENT

(SIR LIONEL LEACH C. J.)

This appeal raises an interesting question of law. We consider that the correct opinion was expressed in the judgment under appeal.

The plaintiff and defendants 1 to 5 were the owners of a parcel of agricultural land measuring 2.:0 acres. In 1939 there were proceedings under s. 145 of the Code of Criminal Procedure. As the result of the inquiry the magistrate held that the sixth defendant was in possession, and passed an order under sub-section (6) of the section. The order, which is dated the 16th January 1939, was passed against defendants 1 to 5 alone. The plaintiff was not a party to the proceedings under s. 145. Defendants 1 to 5 filed an application in this court, asking for revision of the Magistrate's order. This application was rejected *in limine* by an order dated the 15th August, 1939. The suit out of which the appeal arises was filed on the 26th May, 1942. The plaintiff asked that possession be given to him and to his co-owners. Article 47 of the Limitation Act provides that a suit of this nature shall be brought within three years of the date of the final order in the case. It can only be brought by a person bound by the order. The plaintiff was not bound by the order and he had the right to sue without regard to article 47; but if the final order within the meaning of the article is that passed by the magistrate on the 16th January, 1939, the suit was out of time so far as defendants 1 to 5 were concerned. On the other hand, if limitation runs from the date of the dismissal of the application for revision, the whole suit was in time. The District Munsif held that so far as defendants 1 to 5 were concerned the suit was out of time and therefore merely gave a decree to the plaintiff for his share of the property. The decree passed by the District Munsif was confirmed by the Subordinate Judge and by Happell J. on second appeal. The present appeal is by defendants 1 to 5 from the judgment of the learned Judge,

The District Munsif and Happell J. relied on the following observations of Sadasiva Ayyar J. sitting with Napier J. in *Venugopala Mudali* v. *Venkatasubbiah Chetty* (1):—

"I need not say that where the order on a review petition as distinguished from an appeal petition merely refuses to interfere with the judgment or order sought to be reviewed or where an appeal is not entertained at all, though filed, the original decree or order is and continues to be the subsisting and final decree or order. In this respect an order rejecting a review petition stands on a different footing from a decision passed on appeal confirming the lower court's judgment and dismissing the appeal, If the decision on review or revision does interfere with the original decision, the former decision becomes the only subsisting order and stands on the same footing as the decision passed in a competent appeal. It will in that case become the starting point for limitation."

It is true that these observations were in the nature of *obiter dicta*; but for reasons which we shall presently state, we agree with them.

The learned advocate for the appellants contends that an application for revision must be placed on the same footing as an appeal which is summarily dismissed under the provisions of Order XLI, Rule 11 of the Code of Civil Procedure. The decree which gives the starting point for limitation is the decree of the appellate court which in effect embodies the decree of the trial Court. In this connection the judgment of a Full Bench of this Court in *Chidambara Nadar v. Rama Nadar* [2] and the judgments of the Privy Council in *Raja of Ramnad* v. *Kamid Rowthen* [3] and *Nagendranath De* v. *Sureshchandra De* [4] *have been cited.*

In *Chidambara Nadar* v. *Rama Nadar* [2] this Court held that the term "appeal" in article 182 (2) is not used in a restrictive sense so as to exclude revision petitions and the expression "the appellate Court" in this article is not confined to a Court exercising appellate, as opposed to, revisional powers. In arriving at this decision the Court had regard to what the Judicial Committee had said in *Raja of Ramnad v. Kamid Rowthen* [3]

1. (1915) M.W.N. 211 : I.L.R. 39 Mad. 1196
2. (1937) M.W.N. 31: 1937 I.L.R. Mad. 616 F.B.
3. (1929) M.W.N. 376; I.L.R. 49 Mad. 355 P.C.
4. (1932) M.W.N. 817 : I.L.R. 60 Cal. 1 P.C.

and *Nagendranath De* v. *Sureshchandra De* [4] In the former of these two cases Lord Dunedin in delivering the judgment of the Board, observed :

"From this judgmant an appeal in the form appropriate to such a case from the Munsif's court, *i. e.*, a civil revision petition, was preferred to the High Court of Madras."

In *Nagendranath De* v. *Sureshchandra De* [4], in delivering the judgment of their Lordships, Sir Dinshaw Mulla said :

"There is no definition appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course and a decree was made upon it."

These judgments do warrant the assertion that there is an analogy between a revision petition and an appeal; but it does not follow that an order dismissing *in limine* an application for revision of an order passed under section 145 (6) of the Code of Criminal Procedure is a final order within the meaning of article 47 of the Limitation Act. Before the deletion of sub section (3) of section 435 in 1923, the High Court had no power under the Code of Criminal Procedure to hear an application for revision of an order under section 145. As the result of the deletion of that sub section an application for revision does lie under the Code, but the application is still governed by sections 435 to 440 of the Code of Criminal Procedure. Section 440 expressly states that no party has any right to be heard, either personally or by pleader, before any court when exercising its powers of revision. Therefore, when a petition for revision is presented, it is open to the judge before whom it comes to read it through and, if he thinks fit, he can dismiss it without hearing any one. In the present case the advocate who presented the petition was heard, but this makes no difference to the effect of the order of dismissal. The application was dismissed because on the face of the petition there was no scope for the exercise of the court's revisional powers, which means that the order of the magistrate stood entirely untouched.

We are unable to accept the suggestion that in such a case as the present, there is an analogy between a revision petition and an appeal. The order dismissing an application of this nature does not mean the substitution of the order of the High Court for the order of the Magistrate and therefore it cannot be said to incorporate his order. The real analogy is when the Court dismisses an application for review. When it does so, the decree sought to be reviewed stands and an appeal, if one lies, is from the decree, not from the order refusing to review.

There is an other factor. Section 145 of the Code of Criminal Procedure contemplates two orders, a preliminary order under sub-section (1) and a final order under sub-section (6). Article 47 of the Limitation Act applies to the second order. Of course, if the application for revision is accepted and the Magistrate's order is set aside, his order is no longer the final order; but until it is set aside or modified, it is.

We hold that where an order of a magistrate passed under section 145 (6) of the Code of Criminal Procedure is not modified by the High Court in revision, it is the final order within the meaning of article 47 of the Limitation Act.

The appeal fails and must be dismissed with costs in favour of the sixth defendant.

N.T.R — *Appeal dismissed.*

Criminal Revision Case No. 1024 of 1945
(Criminal Revision Petition No. 985 of 1945)
March 26, 1946
KUPPUSWAMY AYYAR, J.

NIMMAGADDA RAMASESHAYYA
v.
EMPEROR

Defence of India Rules, 1939, *R.* 119—*Publication — Presumption — Evidence Act* (*I of* 1872), *S.* 114.

Where a Notification has been published in the official Gazette and signed by the person who has prescribed the manner in which it has to be published, the court can presume that it was directed to be published in the manner in which it was published.

1945 *M. W. N.* 184; *Cr.* 36, distinguished.

Petition under sections 435 and 439, Criminal Procedure Code 1898, praying the High Court to revise the judgment of the Court of the Sub Divisional Magistrate, Ellore, dated 24—8—1945 in C.A.No. 23 of 1945 preferred against the judgment of the Court

of the Stationary Sub Magistrate, Ellore, dated 16—6—1945, in C. C. No. 1603 of 1944.

N.V.B. Sankara Rao, for Petr.
Public Prosecutor (V.L. Ethiraj), for Crown.

ORDER.

The only point urged before me is that in this case the prosecution has not let in evidence to prove that the order infringed had been published in the manner in which the officer who passed the order had directed it to be published and consequently the prosecution must fail. Reliance was placed for this on the decision of this Court in *Public Prosecutor* v. *Narayana Reddi* [1]. In this case evidence has been let in as to how the notification has been published. It has been published in the Fort St. George Gazette, dated 8th June 1943, and the notification is signed by the Commissioner of Civil Supplies. The person who is said to have directed the notification to be published is also the same person. The person who has prescribed the manner in which the notification has to be published has himself signed the notification which is published in the Fort St. George Gazette. The manner of publication must hence be presumed to be in the manner in which it was published in the Fort St. George Gazette, in this case it has not been suggested in the cross-examination of the Tahsildar that the officer who passed the order directed it to be published in any different manner. There is also the usual presumption of official acts, that official act has been done properly. The lower Court was justified without any further evidence in acting on the presumption that it was directed to be published in the manner in which it was published. This aspect of the case has not been considered by my learned brother in *Public Prosecutor* v. *Narayana Reddi* [1]. My attention has also been drawn to one ruling of the Allahabad High Court in *Emperor* v. *Krishnachandra* [2] and to the decision in *Leslie Gwilt* v. *Emperor* [3]. There is nothing to indicate that in any of those cases there was any notification published which was proved or that the notification was signed by the same officer who has directed the manner in which it was to be published. In these circumstances, I do not think those two rulings have any application to the facts of the present case.

1. [1945] M.W.N. 184 : Cr. 36
2. [1945] I.L.R.All. 682
3. [1945] A.I.R.Bom. 368

In the result this petition fails and is dismissed.

N.T.R. — *Petition dismissed.*

PRIVY COUNCIL

(Appeal from Lahore)

February, 26 1946

VISCOUNT SIMON, LORD MACMILLAN, LORD WRIGT, LORD SIMONDS & SIR JOHN BEAUMONT.

ABDUL RAHIM
v.
THE KING EMPEROR

Cr.P.C. (V of 1898), *Ss.* 307, 374, 376, 418 (1), 423, 449 & 537—*Evidence Act (I of* 1872), *S.* 167—*Jury trial—Appeal—Scope of.*

When in an appeal it is found that inadmissible evidence has been admitted in a jury trial, the High Court may, after excluding such evidence, maintain a conviction provided the admissible evidence remaining is in the opinion of the Court sufficiently clear to establish the guilt of the accused.

The law of India differs from the law of England in its attitude to the verdict of a jury in criminal cases. But this is not to say that the verdict of a jury is to be lightly regarded in India.

Improper admission of evidence is by S. 167, Evidence Act expressly declared not to be a ground of itself for a new trial. The appellate court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict.

Where in an appeal it is found that there has been a serious misdirection or nondirection of the jury, the appellate Court has the right and duty to go into the merits of the case and on its own consideration of the evidence to make up its mind whether the verdict was justified or not.

While the guidance given by Ss. 423 (2) and 537 (on the effect of a misdirection to a jury) to an appellate court is expressed negatively, the injunctions may be said to be pregnant negatives, implying that there is a case for reversing or altering the verdict of the jury when the court is of opinion

either that the verdict is erroneous owing to the Judge's misdirection or the jury's misunderstanding of the law laid down by him or that the misdirection has in fact occasioned a failure of justice. That there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court in deciding whether there has been in fact a failure of justice in consequence of a misdirection is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

5 *W. R. Cr.* 80, *F. B.* approved.

21 *Cal.* 955 & 25 *Cal.* 230, overruled.

The circumstance that in some instances the appellant may appeal both on fact and on law while in others the appellant may appeal only on law is not of much importance in determining the scope of the 'interference' by an appellate court with the verdict of the jury. An appeal may be entertained only on a question of law, but once it has been held by the appellate court that there has been an error of law, it is open to it to 'interfere' with the jury's verdict and if it thinks that the error in law affords sufficient ground for doing so, it will then proceed to consider which of the various forms of 'interference' it will adopt. It need not order a re-trial. It may for example acquit the accused. To order a re-trial might well operate injustice in readily conceivable circumstances.

Decision of the Lahore High Court in I. L. R. 1945 *Lah.* 290, *F. B.* affirmed.

Phineas Quass & M. P. Solomon, for Applt.

B. Mackenna, for Respt.

JUDGMENT

Lord Macmillan: The appellant on 12th May, 1944, was convicted on a charge of murder and sentenced to death after a trial before the Sessions Judge of Ambala sitting with a jury of seven. The jury returned a verdict of guilty by a majority of four to three. There were other minor charges against the appellant on which he was also convicted, but it is unnecessary to refer to these. Sentence of death having been passed on the appellant the "proceedings", as required by section 374 of the Code of Criminal Procedure, were submitted for confirmation to the High Court of Judicature at Lahore. The appellant also appealed to the High Court against his conviction.

The case came before a Divisional Bench of the High Court consisting of the Chief Justice Sir Arthur Trevor Harries and Mr. Justice Teja Singh. After reviewing the evidence and the summing up of the Sessions Judge to the jury they came to the conclusion that certain material evidence had been improperly admitted at the trial and that the Judge had seriously misdirected the jury. The Court had then to consider what were its powers in this situation and what course it should adopt. Counsel for the appellant maintained that on both grounds the verdict of the jury should be set aside and a new trial ordered. Counsel for the Crown maintained that notwithstanding the defects in the proceedings the Court was entitled to examine for itself the whole proceedings including the evidence and should not set aside the verdict of the jury and order a new trial unless it was satisfied on a consideration of the whole case that the verdict was wrong and that there had been a failure of justice.

In view of the importance of the questions raised as to the powers of the High Court in such circumstances and as to the proper course to be pursued by it, and also in view of the divergent opinions expressed on this topic in a number of previous reported cases, the learned Judges of the Divisional Bench decided to refer to a Full Bench the two following questions:

'(i) When in a murder reference and appeal it is found that inadmissible evidence has been admitted in a Jury trial, can this Court in view of section 167, Indian Evidence Act, and/or section 537, Criminal Procedure Code, exclude such evidence and maintain a conviction if the evidence remaining is sufficient to warrant it or must a re-trial be ordered?

(ii) When in a murder reference and appeal it is found that there have been serious instances of misdirection and non-direction of a Jury, should this Court in view of section 537, Criminal Procedure Code proceed itself to consider the evidence and maintain a conviction if the evidence is sufficient or must a re-trial be ordered?

Those questions were considered by a Full Bench of five Judges presided over by the Chief Justice which on 11th December, 1944, delivered judgment, answering the questions as follows:

(i) "Where inadmissible evidence has been admitted in a murder reference and appeal under section 449, Criminal Procedure Code, the High Court may, after excluding such evidence, maintain a conviction, provided that the admissible evidence remaining clearly establishes the guilt of the accused".

(ii) "The Court in an appeal by an accused person under section 449, Criminal Procedure Code, can, where there has been a serious misdirection or non-direction, consider the evidence and maintain the conviction if the evidence clearly establishes the guilt of the accused".

The case was remitted with these answers to the Divisional Bench which on 8th January, 1945, dismissed the appellant's appeal and confirmed the sentence of death passed upon him.

By Order dated 3rd August, 1945, special leave to appeal *in forma pauperis* to His Majesty in Council was granted to the appellant on the advice of the Board, but "restricted to the two questions referred to the Full Bench by the Divisional Bench".

It will be observed that the answers returned by the Full Bench are narrower in scope than the questions referred to it, and are limited to cases under section 449 of the Criminal Procedure Code. This is explained by the circumstance that the case was one in which European and Indian British subjects were concerned and therefore came within the special provisions relating to such cases contained in Chapter XXXIII of the Code, and particularly the special provisions relating to appeal in section 449, which *inter alia* authorise an appeal on a matter of fact as well as on a matter of law in jury cases. The judgment of the Full Bench discusses with much learning and a full citation of authorities the whole ground covered by the questions referred to it but thought it right to limit its answers to the specific case, as to which, being a case under section 449, which allowed an appeal on fact as well as on law, it was in any event clear what the answers should be, whatever view might be taken with regard to appeals under other sections of the Code.

As the Order in Council grants leave to appeal on the two questions referred to the Full Bench and as it is desirable that the whole matters raised in these questions should be considered and decided their Lordships do not propose to confine themselves to the special case of appeals under section 449.

In India the verdict of a jury in a criminal case may come before the High Court for consideration in a variety of ways.

I. Under Chapter XXIII, section 307 of the Criminal Procedure Code, if the trial judge disagrees with the verdict and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court "he shall submit the case accordingly recording the grounds of his opinion" and "shall not record judgment of acquittal or of conviction." The powers of the High Courts in such a case are thus defined in sub-section (3) of the section:—

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal and subject thereto it shall after considering the entire evidence and after giving due weight to the opinion of the Sessions Judge and the jury acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and if it convicts him may pass such sentence as might have been passed by the Court of Session."

II. Under chapter XXVII, section 374, of the Code—

"When the Court of Session passes sentence of death the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court."

In such a case the High Court, under section 376

"(a) may confirm the sentence or pass any other sentence warranted by law; or

(b) may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge; or

(c) may acquit the accused person."

III. Chapter XXXI of the Code deals with appeals generally, whether by the public prosecutor from an acquittal or by the accused from conviction and sentence. Section 418(1) provides that "an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury in which case the appeal shall lie on a matter of law only."

Section 423 defines the powers of the Appellate Court disposing of the appeal. The Court under subsection (1) is to send for the record of the case, if not already before it, and "after perusing such record" and hearing parties

"the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction

(1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction subordinate to such Appellate Court or committed for trial; or

(2) alter the finding, maintaining the sentence or with or without altering the finding reduce the sentence; or

(3) with or without such reduction and with or without altering the finding alter the nature of the

sentence but subject to the provisions of section 106 sub-section (3), not so as to enhance the same."

Sub-section (2) of section 423 is of special importance for the present purpose and is as follows :—

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to misunderstanding on the part of the jury of the law as laid down by him."

IV. Chapter XXXIII of the Code, which applies to the case in hand, contains special provisions relating to cases in which European and Indian British subjects are concerned and in relation to jury trials provides in section 449 (1) that "notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court an appeal may lie to the High Court on a matter of fact as well as on a matter of law."

Chapter XLV, which is entitled "Of Irregular Proceedings," provides in section 537 as follows :

'Subjects to the provisions herein before contained no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code'

x x x x

(d) of any misdirection in any charge to a jury; unless such error, omission, irregularity or misdirection has in fact occassioned a failure of justice."

To complete this citation of the statute law affecting revision and appeals in jury trials it is necessary to add the provision contained in section 167 of the Indian Evidence Act, 1872, which applies to all judicial proceedings in or before any Court, including jury trials. The section reads as follows :—

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received it ought not to have varied the decision."

No one can read these statutory enactments without realising the wide disparity between the law of India and the law of England in their respective attitudes to the verdict of a jury in criminal cases. In India the law is purely the creation of statute, and the introduction of the system of jury trial among a people who had no previous experience of its working was not unnaturally accompanied with safeguards and modifications appropriate to such circumstances. In England on the other hand trial by jury, the palladium of British justice as Blackstone terms it, is an institution deeply rooted in the minds and habits of the people with which they have been familiar from time immemorial. It is therefore not surprising to find the verdict of a jury treated differently in Indian criminal legislation. To emphasise the difference it is enough to point out that the statute law in India in certain circumstances permits an appeal against a jury's verdict of acquittal and authorises the Appellate Court to substitute a conviction on its own consideration of the evidence. Time and again eminent judges in India have drawn attention to the importance of bearing these circumstances in mind and the danger of allowing preconceptions derived from English practice to influence the decision of Indian cases. (See, for example, the observations of Jackson, J. in the case of *Elahee Buksh* [1].) This is not to say that the verdict of a jury is to be lightly regarded in India. Far from it. The legislature has enjoined Appellate Courts expressly to pay regard to it. But at the same time it has thought it right and necessary in the circumstances of India to confer upon Appellate Courts extensive powers of overruling or modifying a verdict in the interests of the due administration of justice, confident that the Appellate Judges, who have not themselves seen and heard the witnesses, will not exercise lightly the responsible power entrusted to him.

The first question submitted relates to the effect of the misreception of evidence. It has been found by the High Court that in the present case material evidence was improperly admitted. What are the powers and what is the duty of the High Court in such circumstances? It was contended for the appellant that the evidence properly admitted might have so seriously prejudiced the minds of the jury as to have brought about a failure of justice and that he was entitled on a new trial to have the verdict of a jury on proper evidence. To this submission section 167 of Indian Evidence Act in their Lordships' opinion affords a complete and conclusive answer. The improper admission of evidence is thereby expressly declared not to be a ground of itself for a new trial. The Appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the Appellate Court does not think

1. [1886] 5 Sutherland W.R. 80 (94)

that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the Appellate Court if satisfied that there is sufficient admissible evidence to justify the verdict is plainly entitled to uphold it. If the misreception of evidence is an irregularity within the meaning of section 537 of the Criminal Procedure Code, on which their Lordships find it unnecessary to pronounce an opinion, it plainly has not occasioned a failure of justice where, as here, the Appellate Court, obeying the injunction contained in section 167 of the Indian Evidence Act, has found that there is sufficient admissible evidence to justify the verdict. Their Lordships find themselves accordingly in agreement with the answer returned by the Full Bench to the first question addressed to it by the Divisional Bench subject to an amendment of the concluding words of the answer so as to read "provided the admissible evidence remaining is in the opinion of the Court sufficient clearly to establish the guilt of the accused." They see no need, however, to limit the answer to a murder reference and appeal under section 449 of the Code.

The second question requires more detailed consideration. The High Court has found that in his charge to the jury the learned Sessions Judge seriously misdirected them. Does this entitle the accused as of right to an order for a retrial? It will be observed that in the sections of the Criminal Procedure Code above quoted there is express reference to a misdirection to a jury in two places, once in section 423 (2) and again in section 537. The guidance thereby given to the Appellate Court is in each case negative not positive. Under the earlier section the Court is enjoined not to reverse the jury's verdict unless it is of opinion that the verdict is "erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him." Under the later section the Court is enjoined not to reverse or alter the jury's verdict on account of any misdirection in the Judge's charge unless such misdirection has in fact occasioned a failure of justice. While these injunctions are expressed negatively they may be said to be pregnant negatives implying that there is a case for reversing or altering the verdict of the jury when the Court is of opinion either that the vedict is erroneous owing to the Judge's misdirection or the jury's misunderstanding of the law laid down by him or that the misdirection has in fact occasioned a failure of justice. The primary duty of the Court on appeal is indicated in section 423(1) It is to consider with the record before it whether there is "sufficient ground for interfering." That there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court must proceed to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. It the Court so finds then it has a plain iustification for interfering and indeed a duty to do so.

The controversy which, as the reported cases show, has long existed in the High Courts of India has centred round the question whether the Appellate Court, in deciding whether there is sufficient ground for interfering with the verdict of a jury, particularly where there has been a misdirection by the Judge, has the right and duty to go into the merits of the case for itself and on its own consideration of the evidence to make up its mind whether the verdict was justified or not. On the one hand it has been said that the accused is entitled to have his guilt or innocence decided by the verdict of a jury and that the Appellate Court has no right to substitute its own judgment in place of a verdict by a jury. The powerful observations on this subject by Lord Chancellor Herschell in the case of *Makin* v. *Attorney General for New South Wales* [2] are invoked in support of this view. On the other hand it is argued that it is impossible for the Court to perform the duty laid upon it by the Code without applying its own mind to the soundness of the verdict.

The argument that no man shall be convicted save by the verdict of a jury returned on competent evidence and under proper judicial direction loses much of its force so far as India is concerned when it is realised that in an appeal from an acquittal the Appellate Court under section 423 (1) (a) if it considers that there is sufficient ground for interfering may find the accused guilty and pass sentence upon him according to law. How it can do so without itself going into the whole merits of the case it is impossible to conceive.

Moreover in performing its duty under section 374, when a sentence of death is submitted to it for confirmation, the High Court of necessity is entitled and bound to consider the whole merits of the case for itself. How else could it decide, as it may do, to acquit the accused notwithstanding the jury's verdict of

2. [1894] A.C. 57

guilty? Similarly, under section 307 where the trial judge who disagrees with the jury's verdict submits the case to the High Court it is plainly the duty of the High court to go into the whole case for itself in order to enable it to decide whether the accused should be acquitted or convicted. There is therefore nothing shocking in the estimation of the legislature of India in empowering an Appellate Court, notwithstanding the verdict of a jury, to reconsider the evidence for itself and arrive at a contrary conclusion. Under such a system arguments derived from English practice or from the Australian case abovementioned are seen to be inapplicable and indeed misleading.

But it is said that whatever may be permissible under other sections of the Code, it is not permissible for the Appellate Court to go into the merits of the case in an appeal under chapter XXXI for section 418 enacts expressly that where there has been a trial by jury an appeal shall lie on a matter of law only. This, it is argued, precludes the appellate Court from entering upon the merits. It has already been pointed out that under section 423 the Appellate Court may on an appeal from an acquittal find the accused guilty. This power is not expressed to be inapplicble to cases where the acquittal has been by the verdict of a jury and if it is to be exercised would seem necessarily to involve the consideration of the whole case on the evidence. An appeal may be entertained only on a question of law, but once it has been held by the Appellate Court that there has been an error in law it is open to it to "interfere" with the jury's verdict and if it thinks that the error in law affords sufficient ground for doing so it will then proceed to consider which of the various forms of "interference" it will adopt. Sections 423 clearly indicates that within its meaning a misdirecetion by the Judge falls within the category of error in law, for it contemplates in subsection (2) that an appeal is competent on the ground of misdirection. But a misdirection having been found to have occurred it is not necessarily a ground for interference. It may have been of a more or less trivial character. But if it has led to an erroneous verdict being returned or to a failure of justice the statute plainly indicates that a case for interference has arisen. What form the interference shall take is left to the Court which is given a wide discretion. It need not order a re-trial. It may for example acquit the accused. To order a re-trial might well operate injustice in readily conceivable circumstances.

The question of the precise meaning of the word "erroneous" occurring in section 423(2) has been much discussed. One view is that it means that the verdict is wrong on the merits. The other is that it means that the verdict has been vitiated by the misdirection irrespective of the merits, and that it is not for the Court to consider what judgment it would have given on the merits but what verdict a jury properly directed might have returned on the evidence. Their Lordships do not find it necessary to express an opinion upon this question of construction in view of the terms of section 537 which peremptorily precludes the Court from interfering with a jury's verdict on the ground of misdirection unless the misdirection has "in fact occasioned a failure or justice". The words "in fact" were inserted by amendment to give emphasis to the injunction and it is noteworthy that the legislature took this step after two decisions by the High Court ih Calcutta by which it had been held that it was not entitled in deciding whether there had been a failure of justice to go into the evidence for itself: *Wafadar Khan* [3] and *Ali Fakir* [4], In their Lordships' opinion the Court in deciding whether there has been in fact a failure of justice in consequence of a misdirection is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

In the exhustive judgment of the Full Bench the authorities on the subject are very fully discussed. Their Lordships do not propose to analyse them again in detail. But they desire to draw special attention to the case of *Elahee Buksh*, (cit,sup.) the importance of which seems to have been to some extent overlooked in certain subsequent cases. The decision in *Elahee Buksh's* case [2] was that of a Full Bench of five Judges of the High Court of Culcutta presided over by that learned and experienced Chief Justice, Sir Barnes Peacock. There the appellant was convicted and sentenced to transportation for the crime of dacoity. At the trial the Judge seriously misdirected the jury. The Divisional Bench sought guidance from the Full Bench. The provisions of the Criminal Code at that time were not identical with those now in force but were substantially the same. The learned chief Justice in a careful judgment, concurred in by his colleagues, examined in all its bearings the question of the powers and duty of an

3. [1894] 21 cal. 955
4. [1897] 25 cal. 230

Appellate Court in dealing with an appeal where misdirection has occurred. He points out that the statute does not compel the Court, to send the case back for a new trial. "In determining," he says at p. 90, "whether the verdict ought to be set aside and a new trial granted for a defective summing-up of the evidence, it appears to me that the question to be considered is not whether upon a proper summing-up of the whole evidence a jury might possibly give a different verdict but whether the legitimate effect of the evidence would require a different verdict." He expressed his decision in formal propositions of which the second and third may be usefully quoted :—

"2. That for the reasons above stated there was error in law in the summing up of the evidence which would warrant the Court in setting aside the verdict of guilty if the Court is satisfied that the prisoner was prejudiced by the error and that there has been a failure of justice.

3. That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of Assessors instead of by Jury."

On the point having again arisen in the case of *Wafadar Khan* (*cit. sup*) in 1894 a Calcutta Divisional Bench, to which the case of *Elahee Buksh* was surprisingly not cited, took the view that, there having been misdirection and the appeal being only on law, the Court had no right to go into the facts for itself, in reaching this decision the Court was largely influenced by the Australian case of *Makin* (*cit. sup.*) In 1897 in the case of *Ali Fakir* (*cit. sup*) a Divisional Bench in Calcutta, again without regard to the decision of the Full Bench in the case of *Elahee Buksh,* followed the decision in *Wafadar Khan's* case On the other hand there have been several cases in which the ruling in *Elahee Buksh's* case has been given effect. It is sufficient to refer to the case of *Smither* [5] and *Mathews*[6]. In the former the appeal was by the public prosecutor against an acquittal at a jury trial. There having been a misdirection by the Judge the Advocate General contended that the Court was bound to order a re-trial. This contention was negatived. Benson, J. at p. 15 used these words: "We cannot say that there has in fact been a failure of justice without considering the credibility of the evidence and I think it would be unreasonable and contrary to the express direction of section 537 to hold that once misdirection, even though it be an important one, is established we are bound mechanically to order a re-trial even though in our judgment the evidence for the prosecution is untrustworthy". In the case of *Mathews* the appellant by the verdict of a jury had been found guilty on three charges of cheating and fraud, and the accused appealed from the convictions. Blacker, J. after holding that there had been misdirection, reviewed a number of the conflicting authorities, though *Elahee Buksh's* case was apparently not cited, and reached the conclusion that he was entitled himself "to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice". Having done so he set aside the verdict and sentence and acquitted the appellant on one of the charges but affirmed the verdicts and sentences on the two other charges. Without finding it necessary to express any opinion with regard to the learned Judge's interpretation of the word 'erroneous' their Lordships find themselves in agreement with his decision that he was entitled to examine the evidence for himself in order to see whether it justified the verdicts pronounced, or whether there had in fact been a failure of justice.

5. [1902] 26 Mad 1
6. [1940] A.I.R. Lah 87

Before parting with the case their Lordships would observe that the views of some of the Judges who have considered the matter in India have been much influenced by the circumstance that in some instances the appellant may appeal both on fact and on law while in others the appellant may appeal only on law. Their Lordships do not attach so much importance to this distinction nor do they find in it a determining feature. Consequently they do not think it necessary in agreeing with the answer of the Full Bench to the second question posed by the Divisional Bench in the present case to restrict the answer to appeals arising under section 449 which provides for an appeal both on fact and on law.

In the result their Lordships will humbly advice His Majesty that the appeal be dismissed. — *Appeal dismissed.*

PRIVY COUNCIL

(Appeal from Patna)

June 18, 1946

LORD THANKERTON, LORD PORTER, LORD DU PARCQ, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT.

Ramanugrah Singh

v.

The King Emperor

Cr. P. C. (V of 1898*), s.* 307*—Reference under—Scope of powers.*

Under sub-section (1) *of s.* 307, *Cr. P. C. two conditions are required to justify a reference*

They are first, the judge must disagree with the verdict of the jury and second the judge must be clearly of opinion that it is necessary for the ends of justice to submit the case. The section was intended to guard against the danger of miscarriage of justice through jurors, in their ignorance and inexperience, returning erroneous verdicts, and not to enable the sessions judge and the High Court to deprive jurors, acting properly within their powers, of the right to determine the facts, conferred upon them by the Code. If the jury have reached a conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the sessions judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts. He must go further than that and be of opinion that the verdict is one which no reasonable body of men could have reached upon the evidence.

In dealing with the reference the High Court may exercise any of the powers which it might exercise upon an appeal and this includes the power to call fresh evidence conferred by s. 428. The paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact. In such a case a reference is not justified and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the verdict be disregarded.

The test of reasonableness on the part of the jury may not be conclusive in every case, e.g., a case in which in the light of further evidence placed before the High Court, the verdict is shown to be wrong.

13 *Beng. L. R. Appdx.* 19, 15 *Bom.* 452, 54 *Cal.* 708, 51 *Mad.* 956 & 34 *Bom. L.R.* 896, approved.

35 *Cal.* 879, 29 *Cal.* 128 & 13 *Lah.* 573, overruled.

The charge that witnesses are biassed always affords a legitimate ground of criticism of their evidence. and often for rejecting it in the absence of corroboration.

J. D. Casswell, K. C., A. G. P. Pullan & *Khalil Ahmed* for Applt.

B. J. M. MacKenna, for Respt.

JUDGMENT.

Sir John Beaumont: This is an appeal by special leave from an order of the High Court of Judicature at Patna made on the 21st February, 1945, convicting the appellant upon a charge of murder under section 302 of the Indian Penal Code and sentencing him to transportation for life. By the same order the High Court convicted the appellant upon two charges under section 324 of the Indian Penal Code of voluntarily causing hurt by shooting and sentenced him upon each of these charges to three years' rigorous imprisonment. This appeal relates only to the conviction under section 302.

The judgment of the High Court was given upon a reference made by the Sessions Judge of Patna under section 307 of the Code of Criminal Procedure, and the matter to be determined in this appeal relates to the duties and powers of a High Court in India upon such a reference. The question has frequently been considered by the High Courts in India, but has not been the subject—so far as their Lordships are aware—of a ruling by this Board.

When the matter first came before the Court, the Sub-divisional Magistrate who dealt with it discharged the appellant and the other accused, being of opinion that the prosecution evidence was such that no court would be likely to convict upon it. This order of discharge was upheld in appeal by Mr. Salisbury the then Sessions Judge of Patna; but on an application in revision to the High Court at Patna, that Court took the view that the evidence disclosed a *prima facie* case, and ordered the commitment of the appellant under sections 302 and 324 of the Indian Penal Code, and of the appellant and certain other persons under section 201. Accordingly the Magistrate framed charges against the appellant, first, of committing the murder of Nanku Mahton, being an offence under section 302 of the Indian Penal Code; secondly, of causing hurt to Rajinder Singh by shooting him, being an offence under section 324; thirdly, of causing hurt to Sital Singh by shooting him, being an offence under section 324. There was also a charge under section 201 of causing

evidence of the murder to disappear, but nothing turns upon this since the High Court recorded no conviction upon it.

The case was tried before Mr. S.K. Das, the then Sessions Judge of Patna, and a jury. On the 26th August, 1944, the jury returned their verdict, and by a majority of 5 to 2 acquitted the appellant upon the charge of murder under section 302, and by a majority of 4 to 3 convicted him upon the two charges under section 324. The Sessions Judge was dissatisfied with the verdict of the jury upon the charge of murder brought against the appellant, and, being clearly of opinion that it was necessary for the ends of justice to do so, submitted the case of the appellant to the High Court under section 307 of the Code of Criminal Procedure. It appears from the judgment delivered by the learned Sessions Judge and from his letter of reference, that he thought that the jury, in convicting the appellant under section 324, had accepted in substance the case for the prosecution, and that the acquittal of the appellant under section 302 rendered the verdict self-contradictory. But the case cannot be disposed of on so simple a basis. No doubt in convicting the appellant under section 324 the jury must be taken to have rejected the evidence of alibi set up by the appellant, and they may also be taken to have rejected the version of the shooting suggested by the defence in cross examination of the prosecution witnesses, though supported by no substantive evidence, that the killing of Nanku Mahton and the wounding of Rajinder Singh and Sital Singh were the work of Jodhi Singh, the father of the appellant, acting in self defence, and that the shooting took place in the dalan of Jodhi's bungalow. But there is no inherent contradiction in the jury holding that there was satisfactory evidence that the appellant wounded two men in the circumstances alleged by the prosecution, but that there was no satisfactory evidence that he killed the third man, or alternatively, killed him in circumstances which rendered the killing culpable homicide. Any court called upon to pronounce upon the correctness of the verdict would be bound to consider the evidence.

The question whether the High Court disposed of the reference according to law must depend ultimately on the construction of section 307 of the Code of Criminal Procedure, but before considering the terms of that section, it is desirable to notice other sections of the Code dealing with trials by jury, so as to see how section 307 fits into the general picture. Section 267 provides that all trials under Chapter 23 (which deals with trials before High Courts and Courts of Sessions) before a High Court shall be by jury. Under this section all Sessions cases in the presidency Towns of Madras, Bombay and Calcutta, where the High Courts possess original criminal jurisdiction, are tried with a jury, and the Code until very recently conferred no right in appeal or revision against the verdict of the jury, though the judge need not accept a majority verdict with which he disagrees. Section 268 provides that all trials before a court of Sessions shall be either by jury or with the aid of assessors, and section 269 enables the provincial government to direct that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury in any district. Section 297 requires the judge to sum up the evidence to the jury and to lay down the law by which they are to be guided. Section 298 deals with the duties of the judge, who has to decide all questions of law. Section 299 provides that it is the duty of the jury (a) to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the judge, to be returned, (b) to decide all questions which according to law are to be deemed questions of fact. These provisions may be compared with those in section 309 relating to trials with assessors. That section requires the court to take the opinion of each of the assessors orally and to record such opinion, but expressly provides that in giving judgment the judge shall not be bound to conform to the opinions of the assessors. Section 410 gives to any person convicted on a trial held by a Sessions Judge or an additional Sessions Judge, a right of appeal to the High Court. Section 418 provides that an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only. Section 423, after conferring various powers on an Appellate Court, directs in sub-section 2 that nothing contained in the section shall authorise the court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

It is clear from these sections of the Code that the legislature drew a sharp distinction between a trial by jury and a trial with the aid of assessors. A jury, aided by the judge, is the final tribunal for deciding the facts;

assessors merely aid the judge who decides the facts as well as the law.

It will now be convenient to set out the terms of section 307.

"307.—(1) If in any such case (viz. of trial by jury) the judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

(2) Whenever the judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session."

Under sub-section (1) two conditions are required to justify a reference. The first, that the judge must disagree with the verdict of the jury, calls for no comment, since it is obviously the foundation for any reference. The second, that the judge must be "clearly of opinion that it is necessary for the ends of justice to submit the case" is important, and in their Lordships' opinion provides a key to the interpretation of the section. The legislature no doubt realised that the introduction of trial by jury in the Mofussil would be experimental, and might lead to miscarriages of justice through jurors in their ignorance and inexperience, returning erroneous verdicts. Their Lordships think that the section was intended to guard against this danger, and not to enable the Sessions judge and the High Court to deprive jurors, acting properly within heir powers, of the right to determine the facts conferred upon them by the Code. If the jury have reached a conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the Sessions judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts, since he is not the tribunal to determine the facts. He must go further than that and be of opinion that the verdict is one which no reasonable body of men could have reached upon the evidence. The powers of the High Court in dealing with the reference are contained in sub.section 3. It may exercise any of the powers which it might exercise upon an appeal,and this includes the power to call fresh evidence conferred by section 428. The court must consider the whole case and give due weight to the opinions of the Sessions judge and jury, and then acquit or convict the accused. In their Lordships' view the paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the Trial Court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the jury must prevail, since they are the judges of fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If however, the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the veridict be disregarded.

Their Lordships would, however, observe that the test of reasonableness on the part of the jury may not be conclusive in every case. It is possible to suppose a case in which the verdict was justified on the evidence placed before the jury, but in the light of further evidence placed before the High Court the verdict is shown to be wrong. In such a case the ends of justice would require the verdict to be set aside though the jury had not acted unreasonably.

Their Lordships have been referred to many Indian cases on the construction of section 307. In some of them the view has prevailed that in dealing with a reference under section 307, the High Court will only interfere with the verdict of the jury if it finds the verdict "perverse, in the sense of being un-

reasonable", "manifestly wrong" or "against the weight of evidence". In support of this view their Lordships may refer to: *Queen* v. *Shan Bagdi & Co. & ors* [1] *Queen Empress* v. *Dada A'na* [2], *Emperor* v. *Har Mohan Das* [3] *In re Veerappa Goundan & Ors* [4], *Emperor* v. *Bai Lali* [5]. On the other hand, in other cases the view has been taken that the High Court on a reference must act upon its own view of the facts and is not bound to accept the opinion of the jury, even if not shown to be unreasonable. In support of this view the cases *Emperor* v. *Ram Chandra Roy* [6] *Emperor* v. *Lyall & Ors* [7], *The Crown* v. *Harwick* [8] may be mentioned. For the reasons already given their Lordships agree in substance with the reasoning in the former line of cases, but they would emphasise that the requirements of the ends of justice must be the determining factor both for the Sessions judge in making a reference and for the High Court in disposing of it.

It remains to consider whether in this case the High Court dealt with the reference in accordance with the principles enunciated above. It may be mentioned that the High Court examined two witnesses, the doctor who had given evidence in the Magistrate's Court but not in the Sessions Court, and a gunnery expert. But their evidence does not appear to have strengthened the prosecution case. The judgment of the court was delivered by Imam J., Varma J., merely expressing agreement. In the first paragraph of his judgment, Mr. Justice Imam observed that since the whole case was before the court under section 307 of the Code of Criminal Procedure, it was necessary to come to a definite conclusion on the evidence in the case as to whether the present appellant was guilty of the offences with which he had been charged. The learned judge then discussed in detail various criticisms made by the defence on the prosecution case, and came to the conclusion that the prosecution case was proved. But he did not discuss whether the jury, acting reasonably within their powers, might not have been justified in taking a view more favourable to the defence. Indeed, throughout his judgment the learned judge did not mention the jury, and he appears to have attached no weight whatever to their opinion. The judgment is appropriate to an appeal, rather than to a reference under section 307.

Mr. Mackenna for the Crown has however argued that even if the judges of the High Court approached the case from the wrong angle, they would have been bound to reach the same conclusion had they considered the case from the right angle, and that the appeal should be dismissed. It is necessary therefore to refer to some of the material passages in the judgment. Mr. Justice Imam noticed that all the prosecution witnesses were members of the party of Medhabarat, a pleader of Patna, between whom on the one side and the appellant and his father on the other, bitter enmity existed. The learned judge said that he had no doubt that having regard to the enmity existing, it was necessary to examine the evidence against the appellant with very great care, and that throughout the hearing of the reference he had had to keep in mind the possibility that the appellant might have been falsely implicated owing to the enmity. The charge that witnesses are biassed always affords a legitimate ground of criticism of their evidence, and often for rejecting it in the absence of corroboration. It was essentially a matter for the jury to decide whether they would accept the evidence of interested witnesses, but Mr. Justice Imam ignores this.

The learned judge discussed a certain degree of improbability in the story of an incident said to have taken place in Medhabarat's dalan before the actual shooting, and as to this, the learned judge said, "I am unable to say on the evidence on the record that the evidence of the prosecution that an incident took place in Medhabarat's dalan which resulted in his and his companions' flight towards Rikhi Singh's court yard was so improbable as to be disbelieved. It is true that the evidence is of persons who are hostile to Jodhi Singh and Ramanugrah, but that by itself is not a sufficient reason for discarding the evidence ... . I can find no sufficient justification for discarding the evidence of the witnesses and I would hold that the prosecution evidence is substantially true regarding the incident at Medhabarat's dalan". This passage illustrates the disregard, which appears throughout the judgment, of the jury.

The learned judge then noticed a difficulty which had particularly impressed the Sub-divisional Magistate and Sessions Judge who had thought in the first instance that no *prima facie* case was made out against the accused. The prosecution case was that the men were shot

1. [1874] 13 Beng L. R, Appdx. 19]
2. (1889) I.L R. 15 Bom. 452
3. (1927) I.L.R. 54 Cal 708
4. (1929) M.W.N 185: I.L.R. 51 Mad. 956
5. (1932) 34 Bom. L.R. 896
6. (1928) I.L.R. 55 Cal. 879
7. (1902) I L.R. 29 Cal. 128
8. (1932) I.L.R. 13 Lah. 573

whilst running away, but the medical evidence showed that they had not been wounded in the back. Mr. Justice Imam considered that the injured men might have been shot when looking round to see the men following them. Clearly the jury cannot be considered unreasonable if they were impressed with a point which a Magistrate and Sessions Judge had thought fatal to the prosecution case.

The learned judge then noticed the argument that, whilst there was corroboration of of the shooting of Rajinder and Sital at the places alleged by the prosecution, in the finding at those places of cartridge caps pellets, blood-stains and marks of shot on the surrounding walls, there was no corroboration as to the place where Nanku was alleged to have been killed. As to this the learned judge thought that some corroboration was afforded by the evidence of the Inspecting Officer that he found that at the place where Nanku was supposed to have been shot, the earth had been freshly plastered with cowdung and that he saw faint marks of blood beyond the plastered space. In cross-examination the Sub Inspector had said that he could not say that the cowdung was just fresh; an admission which really destroyed the suggestion that the place had been plastered in order to conceal traces of the murder, since the place was examined only a few hours after the shooting. Apart, however, from this, there is nothing to indicate that any of the samples of earth which the Sub Inspector sent to the chemical analyst to be tested for traces of human blood came from the place marked "D" on the plan where Nanku is supposed to have been shot, and there was no evidence before the jury of any traces of human blood found at "D". Mr. Justice Imam then went on to consider the fact that no pellets were found at the place where Nanku was alleged to have been shot, and that there were no marks of shot on the wall behind that place. As to this Mr. Justice Imam suggested that it was just possible that it did not occur to the Sub Inspector to examine the wall behind the point "D" more carefully having secured sufficient other evidence. No such suggestion seems to have been put to the Sub Inspector, and the jury can hardly be blamed if they did not accept the view that the Sub Inspector omitted to examine the one wall really material on the charge of murder, though he had made a very careful examination of the other walls in the vicinity. The absence of any marks of shooting behind the place were Nanku is said to have been shot is difficult to reconcile with the prosecution case as to the line of shooting.

The learned judge summed up his conclusions in these words: "The conclusion therefore at which I have arrived is that the evidence that Ramanugrah fired the gun at village Bareya near the courtyard of Rikhi Singh which caused the death of Nanku Mahton and injured Rajinder Singh and Sital Singh as given by the prosecution is true". The court therefore convicted the appellant under sections 302 and 324. The Sessions Judge had expressed the opinion that the offence fell under section 304 and not 302, but the High Court was not bound by this opinion. In their Lordship's opinion had the High Court approached the reference on the right lines and given due weight to the opinion of the jury they would have been bound to hold that the reference was not justified and that the ends of justice did not require any interference with the verdict of the jury. It is impossible to hold that the jury were unreasonable or perverse in taking the view, as they seem to have done, that for the shooting of Rajinder and Sital, who were relations of Madhabarat and working with him, and against whom, therefore, the appellant had some reason for enmity, the story of the eye-witnesses, corroborated as it was by some independent evidence, might be accpted; but that for the shooting of Nanku, a mere servant for whose murder by the appellant no motive was shown, the story of the eye-witnesses, which was without any corroboration and indeed difficult to reconcile with some of the facts proved, was not one which could be safely accepted. There is nothing inconsistant in these two views.

Mr. MacKenna further suggested that the case should be sent back to the High Court for reconsideration on the lines laid down in this judgment, but as their Lordships are satisfied that reconsideration of the case on such lines could only result in the verdict being upheld, they see no advantage in adopting this course.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and the conviction of the appellant under section 302 of the Indian Penal Code and the sentence of transportation for life passed upon him under that section set aside. The conviction and sentences passed on the appellant under section 324 are not the subject of appeal and are not affected by this judgment.

— *Appeal allowed.*

PRIVY COUNCIL
(Appeal from Nagpur)
May 7, 1946

THE LORD CHANCELLOR, LORD WRIGHT LORD DU PARCQ, LORD JURTICE MORTON & SIR JOHN BEAUMONT

THE KING EMPEROR
v.
VIMLABAI DESPANDE & another

Defence of India Rules, 1939, *rr*. 129 & 26—*Arrest under r*. 129(1)—*Legality of—Onus—Differences between r*. 26 & *r*. 129—*Arrest illegal—Validation under r*.129(4)—*Cr.P.C.* (*V of* 1898), *s*. 491—*Order under—Appeal to Privy Council*.

An appeal lies direct to the Privy Council from an order of a High Court discharging a person from custody under s. 491, *Cr.P.C.*

Appeals from decisions of Courts in British Dominions and Dependancies to the King in Council are heard under the Royal prerogative and that prerogative can only be curtailed by force of an Act of Parliament, that is, by the King in Parliament.

A contention that no appeal is competent is open at the hearing of an appeal, notwithstanding that special leave has been given without reserving express power to challenge the competency of the appeal.

Where a police officer makes an arrest under r. 129(1) *of the Defence of India Rules, he is bound to prove to the satisfaction of a court before whom the arrest is challenged that he had reasonable grounds of suspicion.*

Shearer v. *Sheilds* 1914 *A.C.* 808, followed.

Liversidge's case 1942 *A.C.* 206, distinguished

The Provincial Government has no power to make an order under r. 129(4) *for the temporary custody of the detenu whose arrest under sub-rule* (1) *was invalid.*

If the orders made by the police or the Provincial Government are invalid, they are not made in the exercise of the powers conferred by the Act within s. 16(1) *of the Defence of India Act.*

Decision of the Nagpur High Court in I.L.R. 1945 *Nag*. 6 affirmed.

Sir Thomas Strangman, K. C, & *B. J. M. Mackenna*, for Applt.

C. S. Rewcastle, K. C., S. P. Khambatta & *Sen*, for Respt.

JUDGMENT

SIR JOHN BEAUMONT: This is an appeal by special leave from an order of the High Court of Judicature at Nagpur made on the 29th September, 1944. The order was made by the High Court in purported exercise of the powers conferred on it by section 491 of the Code of Criminal Procedure, which enables High Courts to take action in the nature of *habeas corpus*. The order directed that the second respondent, Puroshottam Yeshwant Desphande, (hereinafter called "the detenu"), should be set at liberty forthwith on the ground that his detention was illegal. In granting special leave to appeal, the Board imposed the two following conditions: (1). That the detenu should not in any event be re-arrested in respect of the matters to which the appeal relates, and (2) That the petitioner should pay the costs as between solicitor and client incurred by the respondents both in opposing the petition and in the appeal.

At the outset counsel for the respondents contended that no appeal was competent. That such a contention is open at the hearing of an appeal, notwithstanding that special leave has been given without reserving express power to challenge the competency of the appeal, was established by two decisions of this Board, *Zahid Husain* v. *Mohamad Ismail* [1] and *Mukhlal Singh* v. *Kishuni Singh* [2]. In support of his argument that the appeal is incompetent counsel relied mainly on the well known case of *Cox* v. *Hakes* [3] and a recent decision of this Board, *The King Emperor* v. *Sibnath Banerj* [4]. In *Cox* v. *Hakes* [3] the House of Lords decided that in England no appeal lay from an order of discharge made on the return to a writ of *habeas corpus*. The question turned primarily on the construction of section 19 of the Judicature Act, 1873. In their speeches, both Lord Halsbury and Lord Herschell noticed two decisions of the Privy Council, *Attorney-General for Hong Kong* v. *Kwok A Sing* [5] and *Reg v. Mount* [6] and pointed out that special considerations applied to appeals from Colonial Courts in which the Privy Council was tendering advice to His Majesty as to the exercise of the prerogative. The case of *The King Emperor* v. *Sibnath Banerji* [4] was one in which an appeal lay from an order of discharge made by a High Court in India under section 491 of the Code of Criminal Procedure to the Federal Court under section 205 of the Government of India Act, 1935 and from the Federal Court to the Privy Council under section 208 and it was held that the rule in *Cox* v. *Hakes* [3] had no application to such a case.

1. (1930) 57 I.A. 186 P.C.
2. (1931) M.W.N. 286 : 57 I.A. 279 P.C.
3. 15 App. Case 506
4. (1945) M.W.N. 546: Cr. 94; 72 I.A. 241 P.C.
5. (1873) L.R. 5 P.C. 179
6. (1875) L.R. 6 P.C. 283

In the present case, however, no appeal lay to the Federal Court under the Government of India Act, 1935, since no question was involved as to the interpretation of the Act or any Order-in-Council made thereunder, and the question for decision is whether an appeal lies direct to the Privy Council from an order of a High Court discharging a person from custody under Section 491 of the Code of Criminal Procedure. The broad principle which must determine this question is that appeals from decisions of Courts in the British Dominions and Dependencies to the King in Council are heard under the Royal Prerogative, and that the prerogative can only be curtailed by force of an Act of Parliament, that is, by the King in Parliament. There is no Act of Parliament which prohibits, or authorises the prohibition of, an appeal to His Majesty in Council by a party aggrieved against an order discharging from custody under Section 491 of the Code of Criminal Procedure. In their Lordships' opinion, therefore, the preliminary objection fails.

Dealing with the merits of the matter, their Lordships think that the questions for decision lie within a narrow compass and depend on the construction of Rule 129 of the Defence of India Rules, 1939, with which must be read Rule 26. It will be convenient at the outset to set out the relevant provisions of those Rules.

"Rule 129—(1) Any police officer . . . may arrest without warrant any person whom he reasonably suspects of having acted . . .

(a) . . . in a manner prejudicial to the public safety or to the efficient prosecution of the war.

(2) Any officer who makes an arrest in pursuance of sub-rule (1) shall forthwith report the fact of such arrest to the provincial Government and pending the receipt of orders of the Provincial Government may subject to the provisions of sub rule (3), by order in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify: Provided—

(i) that no person shall be detained in custody under this sub-rule for a period exceeding 15 days without the order of the Provincial Government; and

(ii) that no person shall be detained in custody under this sub-rule for a period exceeding 2 months.

(4) On receipt of any report under the provisions of sub-rule (2) the Provincial Government may, in addition to making such order subject to the second proviso to sub-rule (2) as may appear necessary for the temporary custody of any person arrested under this rule, make in exercise of any power conferred on it by any law for the time bring in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the said Government in the circumstances of the case to be reasonable or necessary."

"Rule 26—(1) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety the maintenance of public order, His Maiesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas, or the efficient prosecution of the war, it is necessary so to do, may make an order:

(b) directing that he be detained;"

The relevant facts giving rise to this appeal can be briefly stated:

(a) On the 21st August, 1944, the detenu was arrested pursuant to an order given by the Deputy Inspector-General of Police, under Rule 129. The arrest was made by a Police Officer, K. C. Diwakar.

(b) On the 22nd August, under an order signed by the said K. C. Diwakar, the detenu was committed to the custody of the Superintendant, Central Gaol, Nagpur. The order was expressed to be made under the powers conferred by sub-rule (2) of Rule 129.

(c) On the 23rd August, a report of the arrest was made to the Provincial Government as required by sub-rule (2).

(d) On the 26th August, the Provincial Government, purporting to act under sub rule (4) of Rule 129, directed that the detenu be detained in police custody for a period expiring on the 4th September, 1944.

(e) On the 2nd September, 1944, the Provincial Government, purporting to act under sub-rules (2) and (4) of Rule 129, directed that the detenu should be detained in police custody for a further period of 15 days from the 5th September, 1944. A further order was made by Government on the 19th September, 1944, for a further extension of the period of detention, but as this order was made after the hearing in the High Court, such order cannot affect the position.

(f) In the meantime, namely, on the 25th August, the detenu's wife, who is the first respondent, made application to the High Court under Section 491 of the Code of Criminal Procedure, complaining that the detention of the detenu was illegal and improper. This application was supported by certain affidavits made by Waman Deshpande, a nephew of the detenu, alleging, amongst other things, that the detenu had been interrogated by the police whilst in prison, that he had been questioned only about one Inamdar, a former employee of the detenu, who was alleged to have been concerned in a dacoity committed in the Province of Bombay, and that no questions were ever put to the detenu about any activities

which could have brought him withn the operation of Rule 129 of the Defence of India Rules.

(g) No evidence was filed by the Police Officer who arrested the detenu, or by the Deputy Inspector General of Police on whose orders the arrest was made, and the only evidence filed on behalf of the Provincial Government dealing with the grounds of suspicion against the detenu was an affidavit sworn by the Chief Secretary of the Provincial Government on the 10th September, 1944, which said that the report of the arrest of the detenu had been received by the Provincial Government on the 23rd August, and that it revealed reasonable grounds for suspecting that the detenu was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and efficient prosecution of the war, and in the opinion of the Provincial Government there were reasons to suspect that they had already acted in a manner which had prejudiced the public safety. It will be noticed that this affidavit contains no allegation that the detenu himself had been engaged in any subversive activities, or even that he was aware of such activities on the part of his associates.

(h) The application was heard by the High Court of Nagpur on the 11th September, and judgment was given on the 29th September, holding that the detention of the detenu was illegal, and directing that he be set at liberty forthwith.

The two questions which in their Lordships' view arise on this appeal are:

(i) Where a Police Officer makes an arrest under Rule 129 (1) of the Defence of India Rules, is he bound to prove to the satistifaction of a Court before whom the arrest is challenged that he had reasonable grounds of suspicion?

(ii) If he is so bound and fails to discharge the burden laid upon him, is an order made by the Provincial Government under Rule 129(4) for the temporary custody of a person arrested valid notwithstanding that the arrest was invalid?

Upon the first question it is important to notice the differences between Rule 26 and Rule 129. Under the former rule an order of detention can be made only by the Central or Provincial Government, though this power may be delegated under the Defence of India Act; and the Government, may make an order of detention if it is satisfied with respect to any particular person that, with a view to preventing him from indulging in the subversive activities specified, it is necessary so to do. It is to be noticed that the Government must be satisfied, mere suspicion is not enough, but there is no qualifying adverb such as "reasonably" or "honestly" attached to the word "satisfied". On the other hand, under Rule 129, any Police Officer can arrest on mere suspicion, but the suspicion must be reasonable, the exact words being "any person whom he reasonably suspects". As the High Court noticed in their judgment, the House of Lords, in the case of *Shearer* v. *Shields* [7], had to construe a provision in the Glasgow Police Act authorising constables to arrest if they had reasonable grounds of suspicion, and the House held that the burden rested upon the constable concerned to show that his suspicion was reasonable and his act therefore justified. Their Lordships think that the same result must follow under rule 129. Reliance was placed by the appellant on *Liversidge's* case [8], but as the High Court again noticed, there are two very material distinctions between that case and the present one. In the first place, the authority empowered to arrest under the Defence of the Realm Act is a high officer of State, namely, the Home Secretary, and not a mere Police Officer; and in the second place the House of Lords was impressed with the obvious inconvenience and danger to the public which might ensue if the Home Secretary was bound to discolse confidential information on which he had acted. In India this danger is very largely mitigated by the existance of Rule 26 under which the Government can act whenever it is satisfied as to the matters mentioned in the rule. Cases in India under the Defence of India Rules which may involve disclosure of secret and confidential information will arise only in cases lying in the border land between the Police being suspicious, and Government being satisfied, as to a person's subversive activities, and such cases are hardly likely in practice to be either numerous or serious.

In their Lordships' opinion, therefore, the High Court was right in holding that the burden lay upon the Police Officer to satisfy the Court that his suspicions were reasonable, and it is plain that on the evidence he had not discharged that burden.

The second question turns on the construction of Sub-Rule (4) of Rule 129, and was strongly pressed by Sir Thomas Strangman on behalf of the appellant. His contention was that the Provincial Government, acting under the power conferred by Sub-Rule (4), had

7. [1914] A.C. 808
8. [1942] A.C. 206

made orders for the temporary custody of the detenu which were on their face unobjectionable and that such orders were valid whether or not the detenu had been validly arrested. Counsel felt the difficulty of maintaining that an order for detention would be valid if the arrest had been made in bad faith, which he submitted was not the case which he had to meet, and he suggested that an order for custody would be valid if in the light of circumstances known to the Government the arrest appeared to be proper. But the language of Sub-rule (4) affords no warrant for any such distinction. If a valid order for custody can be made, although the arrest was invalid, it can make no difference whether the illegality of the arrest was due to an honest error or to an act of bad faith.

Sub-rule (4) is curiously expressed. It provides that on the receipt of a report under Sub-rule (2) which, be it noted, need only be as to the fact of arrest, the Provincial Government may, in addition to making such order as may appear necessary for the temporary custody of any person arrested under the rule, make, in exercise of any power conferred on it by any law for the time being in force, such final order as to his detention as may appear to Government to be reasonable or necessary. Reference to any law for the time being in force introduces the powers conferred by Rule 26 and possibly other provisions of law, though no such provisions were brought to their Lordships' attention. The sub-rule is so framed as to suggest that what is really being conferred on Government is power to make a final order, power to make an order for temporary custody being expressed parenthetically. But when the language is looked at carefully it is plain that the sub-rule does not purport to enlarge the powers which Government may possess under any law for the time being in force, and this part of the rule seems designed only to indicate that Government can take advantage of a person being in temporary custody when making a final order under any other law. But a final order for detention can be made under Rule 26 on Government being satisfied as in the rule mentioned, and its validity depends in no way upon the person against whom the order is made being already under arrest. The only substantive power which is conferred upon the Provincial Government by sub-rule 4 is a power to make such order as may appear necessary for the temporary custody of any person, not, be it noted, "arrested", but "arrested under this rule", that is on reasonable suspicion as to the person's activities. If no arrest was made under the rule, the power to make an order for temporary custody of the detenu never arose. Their Lordships therefore agree with the High Court in thinking that the Provincial Government had no power to make an order for the temporary custody of the detenu whose arrest under sub-rule (1) was invalid.

Mr. MacKenna, for the appellant, further relied on Section 16, sub-section (1) of the Defence of India Act, 1939, which provides "no order made in exercise of any power conferred by or under this Act shall be called in question in any Court". But this argument only raises the same question in a different form. If the orders made by the Police or the Provincial Government were invalid they were not made in exercise of a power conferred by the Act.

The learned judges of the High Court in their judgment—which is not open to criticism on the ground of undue brevity—discussed various other aspects of the case, and their Lordships must not be taken as being in agreement with all the opinions expressed by the learned judges. Upon the view which their Lordships have expressed that the Provincial Government have failed to prove that arrest of the detenu was justified, and that the orders for custody made against him were illegal, the High Court was plainly justified in making the order which it did make under Section 491 of the Code of Criminal Procedure.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the respondent's costs of this appeal as between solicitor and client.

——— *Appeal dismissed.*

FULL BENCH

Referred Case No. 14 of 1946

March 25, 1946

SIR LIONEL LEACH, C J., LAKSHMANA RAO & HAPPELL, JJ.

In re a Pleader, Gudivada

v.

P. B Annangarachari

Legal practitioner—Affidavits—Drafting.

In drafting affidavits, a legal practitioner has not got to satisfy himself that the statements made by his client were absolutely true. All that is incumbent on him is to satisfy himself that there were reasonable grounds for believing them to be true.

The Advocate-General in support of the Notice.

P Satyanarayana Rao & P. Sivaramakrishnaiah for Pleader.

T. C. A. Bhashyam, for Complainant.

JUDGMENT

(Sir Lionel Leach, C.J.)

The complainant and the respondent are pleaders practising at Gudivada. Last year the complainant was appointed by the District Munsif of Gudivada to fulfil the duties of a Commissioner in giving to a client of the respondent delivery of land which she had purchased at a Court auction. She had previously attempted to get possession, but she had been obstructed. It is common ground that the complainant, decreeholder and the respondent's clerk went to the property on the 13th February 1945 in order that the complainant might deliver the land to the decreeholder. According to the respondent delivery was given by the complainant to the client and a receipt was signed by her in acknowledgment. On the 16th February 1943, that is, three days later, the complainant reported to the District Munsif that he could not give delivery of the property because the decreeholder was not able to point out the boundaries. On the 19th February 1943 the decreeholder swore an affidavit drafted by the respondent in which she alleged that delivery had in fact been given to her, but that the Commissioner had colluded with the judgment-debtor as the result of which he had suppressed the receipt given by her and had filed a false report. In the affidavit it was stated that the complainant had filed a false report with the intention of obtaining wrongful gain, which meant that he had been paid by the judgment-debtor. The matter was inquired into by the District Munsif who held that the charges against the complainant were false. This resulted in the following charges of professional misconduct being framed against the respondent.

"(1) That you have filed a petition on behalf of the puchaser (decreeholder) in O. S. No. 53 of 1935 on the file of Bandar District Munsif's Court with the allegations that the petitioner herein made a false report that delivery was not effected when delivery in fact was effected, that delivery receipt was taken from the decree-holder-purchaser by the petitioner herein, that it was suppressed with a dishonest motive and that the petitioner was won over by the opposite party with a bribe.

(2) That you did so with the full knowledge that the above allegations are false, reckless, scandalous, defamatory and unprofessional.

(3) That you made the abovesaid allegations against the petitioner who was the Commissioner appointed by this Court and as such a public servant with the knowledge that if accepted as true by the court, they would have debarred the petitioner from practising any longer as Pleader and would have further made him criminally liable."

Considerable evidence was taken in the course of the inquiry which the District Munsif conducted. He has reported that it has not been proved that the respondent had drafted the affidavit with the full knowledge that all the statements made therein were false, but he considered that the respondent had acted rashly and with "credulousness". Consequently he recommended that the respondent be warned. The District Judge in forwarding the report agreed with the findings of the District Munsif.

In *Thangavelu Mudaliar* v. *Changalvaraya Gurukkal* (1) this Court pointed out that although an Advocate has his duty towards his client, he has other duties and responsibilities as well. He should not on the instructions of his client make a charge of fraud without satisfying himself that there are reasonable grounds for the allegation. That principle is well settled.

Now, had the respondent in this case reason for accepting his client's instructions? We consider that he had. His clerk who was present on the 13th February 1945 reported to him that delivery had been given to the decreeholder and that a receipt had been taken from her. These statements were in accord with the statements made by the decreeholder herself. It was said that the receipt which she gave was signed by one witness and this fact was mentioned in the affidavit. On the next day a discussion took place in the room of the Bar Association at Gudivada as to whether the signature of one witness to such receipt was sufficient. The complainant was present at this conversation and in fact initiated the discussion. On this occasion the respondent paid to the complainant his fee for acting as the Commissioner. The Complainant did not mention that he had not been able to give delivery to the respondent's client.

In these circumstances we think that the respondent was justified in drafting and filing the affidavit complained of. He had not got to satisfy himself that the statements made by his client were absolutely true. All that was incumbent on him was to satisfy himself that there were reasonable grounds for believing them to be true. It follows from what we have said that we consider that there were reasonable grounds for this belief. In these circumstances we are unable to agree with the District Munsif that the respondent acted recklessly or with undue credulity.

The complaint against him is dismissed.

N.T.R.

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1. (1935) M.W.N. 340

PRIVY COUNCIL

(From the West African Court of Appeal)

April 11, 1946.

LORD PORTER, LORD DU PARCQ & SIR JOHN BEAUMONT

Thomas Shorunke v. The King

Criminal Trial — Subpoena for defence witness — Conditions — Criminal Procedure Ordinance of Nigeria, 1914, *Ss.* 67 & 82.

Under the English Common Law in force in Nigeria an accused man could have applied for and must have been furnished with subpoenas without the imposition of any conditions. The Criminal Procedure Ordinance 1914 *and the Protectorate Courts Ordinance* 1933 *in effect provided that in criminal causes committed to the High Court at the close of the evidence in support of the charge if it appeared to the court a case is made out, it shall ask the accused if he has any witnesses to examine. If the accused stated that he has witnesses to call but that they are not present in court, and the court is satisfied that their absence is not due to any fault or neglect of the accused and there is a likelihood that they could give material evidence on his behalf, the court may adjourn the investigation and issue process or take other steps to compel the attendance of such witnesses. The judge in the present case required the accused to satisfy him that there was a likelihood that the witnesses could give material evidence.*

Held, *that the provisions in the Ordinances did not deal with the accused man's right to apply for a subpoena before or in the course of the trial but only enabled the court to adjourn and issue process even at the very end of the trial of the case. Therefore these provisions did not supersede the Common law rights but supplemented those rights. Therefore the accused was entitled to the issue of process without the imposition of the condition that he should disclose his reason for wishing to call various witnesses set out in his list.*

A provision that at any stage court may summon any person to give evidence does not do away with the right of the subject to the issue of a subpoena as of right. It mearly gives an additional right for the court to issue process at any stage either of its own motion or at the request of any party.

I. L. R. 28 *Mad.* 28, followed.

Elliot & Gorst, for Applt.

Sir Patrick Hastings K. C. & Frank Gahan, for Respt.

JUDGMENT

LORD PORTER: This is an appeal *in forma pauperis* brought by special leave from a judgment of the West African Court of Appeal dated the 27th April, 1940, whereby the appellant appeals against his conviction by the High Court of the Protectorate of Nigeria on the 13th February, 19 0, for breaking and entering a building and committing a felony therein.

The appellant, a police constable, was charged together with three other constables and three other persons, with having broken and entered a store at Ogbomosho and having stolen therefrom £ 300. There were other indictments not now material.

The charge was originally investigated in the District Magistrate's Court at Ibadan and after the evidence had been given for the presecution the appellant together with the rest of the accused reserved his defence.

All seven defendants were then committed for trial at the next Ibadan Assizes.

The trial began on the 1st February, 1940, when the appellant pleaded not guilty and stated that he was represented by a barrister—a Mr. Wells Palmer. As this gentleman was not in court the learned Judge adjourned the trial until the following morning and gave instructions that a wire was to be sent to Mr. Wells Palmer informing him of the adjournment. He also asked the police to give every facility to the appellant to get in touch with his lawyer or employ one locally if necessary. Mr. Wells Palmer replied that he was not appearing and the trial proceeded on the 2nd February and continued on the following days. During that day's sitting a list of witnesses and documents was handed by the appellant to the Court, but he refused to tell the police anything about the contents of the papers required for production or the evidence expected to be given by the witnesses whose names were set out. The learned Judge at the end of the sitting warned the appellant that he must give the gist of the evidence required, in order that it could be judged if relevant, and told him that if relevant, free subpoenas would be issued, but not otherwise.

On the 3rd of February the Solicitor-General, who was appearing for the prosecution, informed the Court that he had endeavoured to assist the appellant to sort out his witnesses and documents. The appellant,

however, had refused his assistance—quite rightly, as the learned Judge observes in the course of his judgment—as he did not want to disclose his defence to the Crown's representatives.

The Solicitor-General appears mistakenly to have thought that the learned Judge had instructed the police to assist the appellant and accordingly asked that they might be relieved from any further obligation to assist in collecting witnesses or documents.

In the circumstances the learned Judge reconsidered his decision and determined to see the accused in chambers on the rising of the Court in order to discover what witnesses and documents would be necessary in the interests of justice to be produced on the appellant's behalf. In the course of this day's proceedings and during the appellant's cross-examination of one of the prosecution witnesses, the Solicitor-General objected to one of the questions put as being irrelevant and the appellant thereupon informed the Court that he would ask no more questions and make no statement untill he got a lawyer. He did thereafter throughout the whole course of the trial remain mute and refuse to take any further part in the proceedings. Nevertheless in accordance with his promise the learned Judge saw the accused in his private room at the close of the day.

At this interview the learned Judge, the interpreter, the appellant and one other accused alone were present, though a police officer had been in the room originally and the Solicitor-General came in for a moment to say that all the necessary documents would be produced.

On this occasion the appellant repeated his assertion that a lawyer was being sent to defend him and was then asked to give a list of the names of the witnesses he wished to call, and the reasons for calling them, in order that subpoenas could be issued by the Court to avoid delay. The reason for this requirement, the learned Judge says, was because it appeared that several were being called from Ondo and it was doubted if they could give any relevant evidence.

The appellant replied that he did not wish to give the purpose for which his witnesses were being called and that a list had already been furnished. The learned Judge seems to have thought this list confused and to have asked for a fresh one; the accused man however failed to furnish a fresh list and again refused, whether from timidity, suspicion or obstinacy, to state the purpose for which he was calling his witnesses.

Their Lordships have seen the list furnished by the appellant, and though it contains a list of both witnesses and documents and perhaps might be clearer, think it sufficient to show the names of the witnesses desired and the places where they were to be found. At a later point in his judgment the learned Judge states that on this occasion the accused was told that he would get no further assistance, and that he could make his own arrangements about subpoenas, but as the appellant was then, and had for some three months previously, been in prison; it is difficult to see what further arrangements he could make.

The appellant lodged an objection on the morning of the 5th February against the case being continued before the learned Judge because of what happened at the interview of the 3rd February and indeed if his own statement is to be accepted he made the same objection when the Solicitor-General contended that his cross-examination was irrelevant and the learned Judge so ruled.

In these circumstances the learned Judge took the view that the appellant had lost heart when he was unable to shake the testimony of the principal witness for the prosecution and was adopting the course he had pursued for the purpose of endeavouring to intimidate the Court and delay the proceedings and not from any genuine desire to have witnesses called.

He accordingly proceeded with the trial and found the appellant and all save one of the other prisoners guilty and sentenced the appellant to seven years' imprisonment.

After his conviction the accused man obtained legal assistance and appealed to the Court of Appeal complaining (*inter alia*) of the refusal of the Court to issue subpoenas, stating that his defence was an alibi filing affidavits by himself and by his Counsel and applying that he himself and his witnesses should be called to give evidence. This application was refused by the Court of Appeal and the conviction affirmed on the 27th April 1940. From this dismissal he appeals to His Majesty in Council.

In these circumstances the only question which was or could be argued before their Lordships of the Judicial Committee was whether the learned judge ought to have issued or caused to be issued the subpoenas asked for without attaching any conditions, or whether he was justified in requiring the ap-

pellant to satisfy him that there was a likelihood that they could give material evidence on the appellant's behalf.

It was conceded by the Crown's representatives that if this question had arisen in England, an accused man could have applied for and must have been furnished with subpoenas without the imposition of any conditions.

It is true that these subpoenas might afterwards have been set aside upon its being shown that those to secure whose presence they were issued could give no relevant evidence, but the onus would be on them to satisfy the Court to this effect. No consideration of that kind arises in the present case.

It might however be said that there was no duty on the Judge trying the case to see that the appropriate subpoenas were issued and that the taking of the necessary steps was a matter for the accused man.

Some such suggestion is contained in the judgment of the learned Judge when he says that at the vital interview the appellant was told that he would get no further assistance and could make his own arrangements about subpoenas.

Their Lordships did not understand that this argument was put forward before the Board on behalf of the prosecution and in any case, as has been pointed out above, it is difficult to see how a man under arrest in the midst of a trial could take steps to ensure that subpoenas would be issued without the assistance of the Court.

The representatives of the Crown however maintained that the position in Nigeria differed from that in England; that the English rule was established by the common law whereas the whole procedure in Nigeria was governed by the appropriate Ordinance and the procedure thereby made applicable.

Before considering what procedure those Ordinances prescribe their Lordships would point out that the principal Ordinance, dealing with the administration of justice in Nigeria is the Supreme Court Ordinance, Chapter 3, of the 1st October, 1914. Section 14 of that Ordinance enacts that subject to the terms of that or any other Ordinance the common law, the doctrines of equity and the statutes of general application which were in force in England on the 1st January, 1900, shall be in force within the jurisdiction of the Court (i.e. the Supreme Court of Nigeria). This provision is repeated in Section 12 of the Protectorate Courts Ordinance No. 45 of 1933.

Section 62 of the earlier Ordinance ordains that "in any cause or matter and at any stage thereof the Court either of its own motion or on the application of any party may summon any person within the jurisdiction to attend to give evidence or to produce any document within his possession, and may examine such person as a witness . . . . and require him to produce any document in his possession or power, subject to just exceptions.

It is true that this latter section states only that the Court *may* summon any person, but their Lordships do not think that this provision does away with the right of the subject to the issue of a subpoena as of right. It merely gives an additional right for the Court to issue process at any stage either of its own motion or at the request of any party.

Moreover, a similar provision contained in Section 159 of Act XIV of 1882 and Section 149 of Act VIII of 1859 of Madras was discussed in the Courts of that province and it was decided in the case of *Veerabadran Chetty* v. *Nataraja Desikar* (1) that a party in entitled to obtain a summons for the attendence of any witness on application before the day fixed for disposal of the case and the judge cannot under the sections referred to refuse the application.

The prosecution, however, rely upon the terms of other sections of the Ordinances of Nigeria as showing that the judge trying the case has the right and duty to enquire into the relevancy of the evidence to be given before issuing a subpoena or directing it to be issued.

As establishing this contention they refer to—

Sections 66 and 67 of the Criminal Procedure Ordinance of Nigeria, ch. 20 of 1914. These sections are to be found in Part II of the Ordinance which deals with Preliminary Investigations They read as follows:—

Section 66. "Immediately after the accused shall so have had opportunity of making his answer to the charge, the Court shall ask him whether he desires to call any witnesses, and the depositions of such witnesses as the accused shall call and who shall appear on his behalf shall then be taken in the like manner as in the case of the witnesses for the prosecution;"

Section 67. "If the accused person states that he has witnesses to call, but that they are not present in Court and the Court is satisfied that the absence of the witnesses is not due to any fault or neglect of the accused, and that there is a likelihood that they could, if present, give material evidence on his behalf, the Court may adjourn the investigation and issue process, or take other steps to compel the attendence of such witnesses."

1. (1904) I.L.R. 28 Mad. 28.

On their face and having regard to the heading and terms of this fasciculus of sections in which they appear these sections apply only to the procedure at preliminary investigations. Part III however of the same Ordinance which is headed Summary Trial contains Sections 77 and 82 and those sections provide :—

Section 77. "Trials in Provincial Courts and before Commissioners of the Supreme Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of this Ordinance.

Section 82. "At the close of the evidence in support of the charge, if it appears to the Court that the case is made out against the accused sufficiently to require him to make a defence, the Court shall ask him if he wishes to say anything in answer to the charge, or has any witnesses to examine or other evidence to advance in his defence and the Court shall then hear the accused and his witnesses and other evidence if any. If the accused states that he has witnesses to call but that they are not present, the Court may under the circumstances set forth in Section 67 take the steps therein mentioned to compel their attendance."

The Protectorate Courts Ordinance No. 45 of 1933 substituted the jurisdiction of the High Court for that of the Supreme Court and section 14 of the Criminal Procedure (Amendment No. 2) Ordinance No. 48 of 1933 repealed Section 77 of Chapter 20 and substituted for it the following Section. Trials before Commissioners of the Supreme Court and magistrates, and, subject to the provisions of the Protectorate Courts Ordinance, 1933, trials in the High Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of the Ordinance;" i.e. in accordance with the provisions of Section 82 set out above.

Finally, The Protectorate Courts Ordinance No 45 of 1933 after dealing in Order V, Rule I, with the summoning of witnesses in terms having similar effect to those of Section 62 of the Supreme Court Ordinance Chapter 3 of 1914, provides in "Part IV Rules of Criminal Procedure, Order XXXIX. Rules for trials after committal to the High Court":

"Criminal Causes committed to the High Court for trial after a preliminary investigation shall not be tried upon information, but such trials shall be commenced by the Court placing upon record the charge or charges made against the accused, and thereafter shall, subject to the provisions of Section 19 of the Ordinance and of any Orders made thereunder be conducted, so far as may be, in the manner laid down in Part III of the Criminal Procedure Ordinance."

The appellant was committed to the High Court for trial after a preliminary investigation and the other steps prescribed in the last named order were followed.

It follows that the provisions of Section 82 of the Criminal Procedure Ordinance of 1914 apply to his case.

The Crown then argue that the only obligations of the Court as to summoning witnesses are those contained in Section 62 of the Supreme Court Ordinance of 1914 or the similar terms of Order V Rule I of the Protectorate Courts Ordinance of 1933 and Section 82 of the Criminal Procedure Ordinance of 1914.

Both, they say, are permissive, not obligatory, and the latter requires in addition that the judge should be satisfied in accordance with the terms of Section 67 that the proposed witnesses should be likely to give relevant evidence on behalf of the accused.

Their Lordships have already stated that in their view the former section even if permissive does not cover the whole field, but deals merely with the time at which and the person at whose request a subpoena may be issued. Moreover it contains no provision enabling the Court to be satisfied that the evidence to be given is relevant.

The latter section, however, does contain such a provision and undoubtedly is made applicable by the later Ordinance not only to the procedure to be adopted where an investigation is taking place before a magistrate, but also to a summary trial and to a trial after previous investigation.

But the question still remains, as it remained in the case of the earlier section, whether its provisions superseded the Common Law rights enjoyed by inhabitants of this country on the 1st January, 1909, or whether its provisions do not take away, but supplement those rights.

In this connection it was urged on behalf of the appellant that both section 82 and sections 66 and 67 are dealing with the procedure to be adopted at a particular moment in the trial, viz., after the case for the prosecution is closed and the accused has had an opportunity of answering the charge. It does not deal with the accused man's right to apply for a subpoena before or in the course of the trial, but only enables the Court to adjourn and issue process even at the very end of the trial of the case.

It would be strange if a man charged with a crime could only obtain a subpoena for the attendance of witnesses at the very end of his trial and then subject to the discretion of the Court as to whether it will grant an adjournment or not.

In their Lordships' opinion the contention urged on behalf of the appellant is well founded.

As against this view it might indeed be argued that, if it were to prevail an accused man could put off his application for the issuing of process to compel the attendance of witnesses until his trial was nearing its end and so not only delay its conclusion but also cause excessive inconvenience in the retention of witnesses. Their Lordships would point out however, that in the present instance the trial lasted some 10 or 11 days after the first application made by the appellant to have his witnesses summoned and documents produced. So that this difficulty did not arise at any rate in any pronounced form. In any case the Court can always protect itself by issuing process but if convinced that the lateness of the application is not due to genuine mistake or justified reason, it can refuse to adjourn the trial. In their Lordships' opinion the contention that the Ordinances and Rules in force in Nigeria provide the only method by which subpoenas and *testificandum* can be obtained in the colony cannot be supported. In their view there exists, side by side with them in appropriate cases, the English Common Law right of subpoena.

Having regard therefore to the fact that in their Lordships' opinion process ought to have issued at the request of the appellant without the imposition of the condition that he should disclose his reason for wishing to call the various witnesses set out in his list, they are unable to say that a grave miscarriage of justice has not occurred.

They will accordingly humbly advice His Majesty that the appeal should be allowed.

— — *Appeal allowed.*

FEDERAL COURT

(On Appeal from the High Court of Judicature at Lahore)

Criminal Appeal No. 1 of 1946

May 9 1946

SIR PATRICK SPINS, C.J., SIR S. VARADACHARIAR & SIR MD ZAFRULLA KHAN, JJ.

Mohammad Mohy-Ud-Din

v.

The King Emperor

Army Act, (*VIII of* 1911), *S* 41—*If* ultra vires —*Government of India Act*, 1833, *S*. 73— *Indian Councils Act*, 1861, *S*. 22.

S. 41 *of the Indian Army Act*, 1911, *in conferring jurisdiction on a court martial to try non-British subjects of the Indian Army for offences committed by them beyond British India was* intra vires *the Indian Legislature.*

S. 73 of the Government of India Act of 1833 did not cease to be in operation after the enactment of the Indian Councils Act, 1861, and also was not repugnant to S. 22 of the Indian Councils Act.

Parliament can authorise even a subordinate legislature to legislate with extra-territorial effect; and Parliament, according to the words used in S 73 of the Government of India Act, 1833, *contemplated the punishment of officers and soldiers of the Indian Army even in respect of offences committed outside the territories under the Government of the East India Company.*

Whatever may be the rule of international law as regards the ordinary citizen, there is no rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its armed forces, when those forces are operating outside its territorial limits.

The expression 'native officers and soldiers' in s. 73 *was intended to refer to the non-British or non-European members of the company's army and has no different significance from the words "officers and soldiers being natives of the East Indies or other places within the limits of the Company's Charter."*

Decision of the Lahore High Court (*A. I. R.* 1946 *Lah.* 158) confirmed.

Sir Alladi Krishnaswami Ayyar, N. Rajagopala Iyengar & B. Banerji, instructed by *Gobind Saran Singh*, Agent, for Applt.

Sir, Noshirwan Engineer, Advocate-General of India & *Mohammad Sadiq*, instructed by *K. Y. Bhandarkair*, Agent for Respt.

JUDGMENT

Spens, C. J. This is an appeal against an order of a Full Bench of the Lahore High Court dismissing an application under s 491 of the Criminal Procedure Code for the release of one Burhan ud Din. Burhan-ud-Din is a Member of the ruling family of Chitral, an Indian State adjoining the North West Frontier Province. The Ruler of Chitral has in recent times been recognised by His Majesty the King Emperor as a Ruler of an Indian State. Burhan-ud-Din is thus admittedly not a British subject: he, however, became an Indian Commissioned Officer in 1936 and was attached to the 2/10 Baluch Regiment of the Indian Army in which he attained the rank of Captain. In September-October, 1945, he was suspected of having committed offences under ss. 121 and 302 of the Indian

Penal Code ; and, pending investigation and disposal of these charges, he was kept in military custody according to the usage of the service. A general court martial for the trial of Burhan-ud-Din was constituted in November, 1945, and he was arraigned before the court-martial in December, 1945, on the charges above referred to. The proceedings before the court-martial were going on when the application under s. 491 of the Criminal Procedure Code was filed before the High Court at Lahore, on December 20, 1945.

The offences charged against Burhan-ud-Din were alleged to have been committed in Rangoon and Singapore. It was submitted in support of the *habeas corpus* application that Burhan-ud-Din who was not a British subject was not amenable to the criminal laws of British India for offences alleged to have been committed outside British India and it was contended that so much of s. 41 of the Indian Army Act 1911, as purported to confer jurisdiction on a court-martial to try non British subjects for offences committed by them beyond British India, was *ultra vires* the Indian Legislature. It was accordingly urged that his detention in military custody for the purposes of the said trial was illegal. On behalf of the Crown, it was maintained that s. 47 of the Indian Army Act was in its entirely *intra vires* the Indian Legislature and that the detention of Burhan ud-Din was legal. The High Court accepted this contention of the Crown and dismissed the application. The learned Judges granted a certificate to the effect that the case involved a substantial question of law as to the interpretation of the Government of India Act, 1935, and the Government of India (Adaptation of Indian Laws) Order, 1937, and on the basis of this certificate this appeal has been preferred.

When opening the case, counsel for the appellant conceded that no question as to the interpretation of the Government of India Act, 1935, arose in the case. The plea that s. 41 of the Indian Army Act, 1911, was to a certain extent invalid was based on s. 22 of the Indian Councils Act, 1861, which, with some amendments made in the years 1865 and 1869, was the law in force at the time the Indian Army Act of 1911 was enacted by the Indian Legislature. The contention of the Crown in support of the validity of s. 41 of the Indian Army Act was based on s. 73 of the Government of India Act of 1833 It was thus clear that nothing turned on the Government of India Act, 1935. As regards Orders in Council under that statute, there was no doubt an alternative contention urged by the Advocate-General before the High Court on the terms of the Adaptation Order of 1937. In the view that the learned Judges took on the main question, it became unnecessary to deal with this alternative argument and two of the Judges accordingly said nothing in their judgments about it Abdul Rashid, J. overruled this contention of the Advocate-General ; but, as he too agreed with the view of the other two Judges on the main question, his observations, on the effect of the Adaptation Order must be taken to be *obiter*. Before us, it was not found necessary to urge this contention based on the Adaptation Order. In the absence of any question involving the interpretation of the Government of India Act, 1935, counsel for the appellant could only rely on his petition asking for leave to urge other contentions and, in the circumstances of the case, he was granted leave to argue the point as to the validity of s. 41 of the Indian Army Act 1911.

Two contentions were urged in support of the appeal. It was argued that s 73 of the Government of India Act of 1833 ceased to be in operation after the enactment of the Indian Councils Act of 1861, that the validity of s. 41 of the Indian Army Act of 1911 must accordingly be determined with reference to the terms of s. 22 of the Indian Councils Act of 1861 (as amended in 1865 and 1869), and that on the true construction of s. 22. the Indian Legislature had no power to enact a law prescribing a punishment for any offence committed by a non-British subject outside British India. Alternatively, it was contended that even if the question should be determined with reference to the terms of s. 73 of the Government of India Act of 1833, the power of the Indian Legislature thereunder was no wider than under s. 22 of the Indian Councils Act of 1861.

It is difficult to follow the contention that s. 73 of the Government of India Act of 1833 ceased to be operative after 1861. The Indian Councils Act of 1861 repealed only certain specified sections of the statute of 1833 and the continuance of the remaining provisions of the older statute was placed beyond all doubt by an express provision in the latter part of s. 2 to the effect that " all other enactments whatsoever now in force with relationto the Council of the Governor General of India ...shall, save so far as the same arealtered by or are repugnant to this Act continue in force and be applicable to the council of the Go-

vernor General of India..... under this Act". S. 73 of the Act of 1833, not being one of the sections specifically repealed, would thus be one of the provisions continuing in operation. This conclusion is confirmed by the express reference to that section in one of the provisos to s. 22 of the Act of 1861. While the body of s. 22 authorised the Governor General in Council in general terms "to make laws and regulations for all persons, whether British or native, foreigners or others, and for all courts of justice whatever and for all places and things whatever within the said territories, etc.", the provisos precluded the Governor General, in Council, in the exercise of this general power, from making any laws or regulations "which shall repeal or in any way affect any of the provisions" of various Acts of Parliament. Among the statutes thus placed beyond the power of the Indian Council to affect were parliamentary enactments "for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian Forces". To this exception, a counter exception was made in so far as the Governor-General in Council might exercise the powers conferred by s. 73 of the Government of India Act, 1833. This makes it clear that Parliament, even while enacting the Indian Councils Act of 1861, contemplated the continued exercise by the Indian Council of the powers conferred on it by s. 73 of the Act of 1833. It seems to have been contended before the High Court that s. 73 of the Act of 1833 was repugnant to s. 22 of the Indian Councils Act of 1861 and must, therefore, be deemed to have ceased to be in operation after 1881, at least in respect of the words now relevant, because the concluding words of s. 2 of the Indian Councils Act of 1861 saved earlier enactments *only* in so far as they were not repugnant to the Act of 1861. This contention was not pressed before us as it is obviously untenable. S. 22 of the Act of 1861 substantially reproduced s. 43 of the Act of 1833 and if both ss. 43 and 73 could have subsisted together in the Act of 1833, there was no reason why they should not co exist after 1861. S. 22 of the Act of 1861 (like s. 43 of the Act of 1833) dealt with the general legislative powers of the Governor General in Council, while s. 73 of the Act of 1833 dealt with a special case, namely, laws governing the armed forces of the Indian Government. There is accordingly no basis for the argument of repugnancy. Before us, appellant's counsel put the argument in a somewhat different form. He contended that in the earlier Act, the power conferred by s. 73 was only an illustration of the general power of legislation conferred by s. 43 and that accordingly any exercise of the power under s. 73 was subject to all the limitations affecting the exercise of the general legislative powers imposed by s. 43 and that if the power conferred by s. 73 continued in force, after 1861, it must similarly be subject to the limitations of s. 22 of the Act of 1861, which section had replaced s. 43 of the earlier Act. It will be convenient to consider this argument when dealing with the second head of the appellant's contention.

Turning now to the Government of India Act of 1833, it must be noticed that s. 73 contained express words connoting a wider territorial operation than that which the words found in s. 43 would authorise. S. 43, which conferred the general legislative power, empowered the Governor-General in Council to make "laws and regulations for all persons, whether British or native, foreigners or others ......for all places and things whatsoever within and throughout the whole and every part of the said territories". The territorial ambit was thus clearly limited. Some extension was provided by another clause which authorised legislation governing all servants of the Company even "within the dominions of Princes and States in alliance with the Company". S. 73, which authorised the framing of Articles of War "for the government of the native officers and soldiers in the military service of the Company and for the administration of justice by court-martial", provided that the Articles so made should have authority "over all the native officers and soldiers in the said military service to whatever Presidency such officers and soldiers may belong or *wheresoever they may be serving*". This provision not only contained no words of territorial limitation, but, by the use of the underlined words "wheresoever they may be serving" clearly indicated an intention to make the Articles binding on the officers and soldiers independently of any territorial limitation. Appellant's counsel rightly placed no reliance on the words to "whatever Presidency such officers and soldiers may belong", because these were not words indicative of a territorial limitation, but were only used in view of the fact that each of the three Presidencies had separate army at that time. But he contended that as a matter of interpretation the words "wheresoever they may be serving" must be construed as being subject either to

the same territorial limitation as is found in s. 43 or at least as being limited to India. Assuming that a subordinate legislature cannot validly make laws imposing punishments on non-subjects for offences committed by them outside the territorial limits of its jurisdiction, there can be no doubt that Parliament can, if it so chooses, authorise even subordinate legislature to legislate with extra-territorial effect. The only question, therefore, is whether, according to the plain meaning of the words used in s. 73, such power was conferred on the Indian Legislature.

It was contended that there was a presumption against construing even general words in an Act of Parliament as intended to have extra-territorial effect or authorise extra-territorial legislation. The passages relied on in this connection from Maxwell's Interpretation of Statutes do not go the length necessary for the appellant's case. It is true that every statute is to be so interpreted, so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law (Maxwell on the Interpretation of Statutes, 8th Edn., p. 130). Whatever may be the rule of international law as regards the ordinary citizen, we have not been referred to any rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits. Indeed, there may be greater reason for recognising such power when the army is operating in enemy country than when it is within its own country. In this view, it is very doubtful whether in a case like the present, there is any presumption necessitating or justifying a limited construction of the general words used in the statute. Further, it is recognised that the presumption, if any, will give way whenever the intention of Parliament is clear or the nature of the subject-matter or the history of the legislation relating to it justifies the assumption of extra-territorial jurisdiction. Our attention has been drawn to several Mutiny Acts passed in England from time to time since the closing years of the 18th century. They make it clear that Parliament intended to make the Acts as well as Articles of War framed by the King binding on the soldiers and officers of the English army even when they were serving outside the British Dominions, with referenc to the East India Company's army also Parliament had passed Mutiny Acts from time to time, beginning from 1754. It would also, appear that the Governors and the Governors-General in India had framed Articles of War for the discipline of the native troops maintained by the Company. The Charter Act of 1813 validated (by s. 97) the Articles of war therefore framed in India and (by s. 96) empowered the Governments in India to make "laws and regulations and Articles of War for the order and discipline of all officers and soldiers, natives of the East Indies or other places within the limits of the said Company's Charter in their respective services etc" This section contains no words signifying either a limited or an extended territorial operation. Counsel for the appellant contended that as the power under this section is described to be "as full and ample" as the power possessed by the Governments in India to "make any other laws or regulations for the Government of the natives of the several territories subject to the said Presidencies", the section must be construed as subject to the same territorial limitation as the general legislative power. Even if this argument should be held to have any force, it would have no application to the Act of 1833, because, as already stated, the language of s. 73 of that Act is clearly different from the language of s. 43 (referring to the general legislative power).

In interpreting s. 73 of the Act of 1833, it may be useful to bear in mind the provisions of an Act passed by Parliament in 1823 (4 Geo. IV C. 81) entitled " An Act to consolidate and amend the laws for punishing mutiny and desertion of officers and soldiers in the service of the East India Company". S. 62 of this Act saved all matters "enacted or declared respecting officers or soldiers being natives of the East Indies or other places within the limits of the said Company's Charter" contained in the Charter Act of 1813, and s. 63 enacted "that whenever any portion of such native troops shall be serving in any country or place out of the possessions or territories which are or may be under the Government of the said United Company, whether such be the Dominions of His Majesty or elsewhere, on the trial of all offences committed by any native officer or soldier or follower, reference shall be had to the Articles of War framed by the Government of the Presidency to which such native officer, soldier, or follower shall belong". It seems to us reasonably clear that it was the sense of the words "serving in any country or place out of the possessions or territories under the Government of the said United Company etc." in s. 63 of this statute

that was sought to be reproduced by the words "wheresoever they may be serving" in s. 73 of the statute of 1833. That Parliament contemplated the punishment of officers and soldiers of the Indian Army even in respect of offences committed outside the territories under the Government of the East India Company is made clear by s. 2 of 7 and 8 Vict. C. 18. We thus see no reason or justification for limiting the scope of the very general words "wheresoever they may be serving" used in s. 73 of the Act of 1833.

Another argument in support of giving the section a limited operation was based on the use of the words "native officers and soldiers" in s. 73. It was contended that Burhan-ud-Din was not a "native" officer within the meaning of the section. The High Court held that the word "native" was here used in contra distinction to British (or European) as both sets of people were employed in the Company's army. Alternatively, they held that the word "native" in this section had the same meaning as the expression "natives of the East Indies or of other territories within the limits of the Company's Charter" found in other paliamentary enactments relating to the Indian Army. Both these interpretations would bring Burhan ud Din within the operation of the section. Counsel for the appellant took strong exception to the view that the word "native" was used in a racial sense and he insisted that it must have been used in a territorial sense and as the descriptive words "of the East Indies and of other territories within the limits of the Company's Charter" found in the Charter Act of 1813 had not been repeated in s. 73 of the Act of 1833, he argued that it was reasonable to infer that the word 'native" referred either to the natives of the Company's possessions or at best to the natives of India. This view would, according to him, exclude persons in the position of Burhan-ud-Din, because he was not a native either of British India or of India (taking Chitral not to have been a part of India in 1833). We are not able to accede to this contention.

It cannot be denied that in more than one parliamentary statute the words "native" and "British" were used as antithetical terms. S. 43 of the Government of India Act of 1833 referred to laws and regulations to be made "for all persons, whether British or native, foreigners or others". S. 22 of the Indian Councils Act of 1861 repeated the same language. In the Charter Act of 1813, s. 55, in providing for the payment of the charges and expenses of raising and maintaining the forces of the East India Company, spoke of "the forces as well European as native". The scheme of the parliamentary enactments relating to the Indian Army shows that a distinction has always been maintained between the British element in those forces and the non-British element, in respect of the Articles of War by which they were to be generally governed. S. 1 of 7 & 8 Vict. C. 18, in referring to the officers and soldiers in the service of the East India Company, grouped them us (i) officers, soldiers and so forth, *not* being natives of the East Indies or other places within the limits of the Company's Charter, and (ii) officers, soldiers and so forth, being natives of the East Indies or other places within the limits of the Company's Charter. It, therefore seems to us not unreasonable to hold that the expression "native officers and soldiers" in s. 73 was intended to refer to the non-British or non-European members of the Company's army. Even if it should be held that the word "native" must be understood as having a territorial significance, that is, as meaning the native of some place or country, it seems to us that the territory contemplated when using the word "native" must have been the same as was connoted by the words "natives of the East Indies or other places within the limits of the Company's Charter." If a limitation as to the locality is to be suggested at all, it may with some show of reason be argued that the word "native" can refer only to natives of the territories under the administration of the Company, but counsel for the appellant obviously felt that this would be too restricted an interpretation to suggest, because it was impossible to maintain that the Company's non-European soldiers were recruited only from the areas within the Company's Government. If such a limitation based on the territorial limits of the authority of the Company is ignored, no particular reason has been suggested why India as a mere geographical unit should have been the territory intended. On the other hand, the Advocate-General pointed out that in later enactments of Parliament, it had been clearly assumed that the Governor-General in Council had authority to frame Articles of War in respect of such officers and soldiers of the Company's army as could be comprehended in the description "natives of the East Indies or other territories within the limits of the Company's Charter" (*Cf.* the concluding words of s. 7 of 3 & 4 Vict. C. 37); and as this power of the Governor-General in Council could be traced only to s. 73 of the Government of India Act

of 1833, he argued that the assumption made by Parliament in the later Act might legitimately be used as an aid in interpreting the general or ambiguous language of the earlier Act. In support of this contention, he relied on the observations of Lord Buckmaster in *Ormond Investment Co.*, v. *Betts*(1) and certain observations in *Admiraliiy Commissioner* v. *Valverda* (2). There are one or two other statutory provisions which seem to us to give a clear indication that the word "native", when used as an adjective in similar statutes, was used in the same sense as the wider expression 'natives of India and other territories included in the Company's Charter", it having been found convenient to add these extra words whenever the word "native" was used in the noun form. In 3 and 4 Vict. C. 37, s. 7 referred to Articles of War enacted by the Government of India "respecting officers or soldiers being natives of the East Indies or other places within the limits of the Company's Charter." In the very next section, the same class of persons was described by the words "any native officer or soldier." In 4 Geo. IV C. 81 we find in one and the same section (s. 62) reference in the earlier portion to officers or soldiers being natives of the East Indies or other places within the limits of the Company's Charter and at the end of the same section these persons are referred to as "such native officers and soldiers". Both kinds of description are also found in the concluding portion of s. 1 of 12 & 13 Vict, C. 43. The conclusion that the expression "native officers and soldiers" had no different significance from the words 'officers and soldiers being natives of the East Indies or other places within the limits of the Company's Charter" is also more consonant to reason than the limited construction suggested on behalf of the appellant, because no reason has been or can be suggested for making a distinction between native officers and soldiers recruited from India and native officers and soldiers recruited outside India, in respect of the application of Articles of War to them, so long as both sets of people were serving in the Indian Army.

We are accordingly of the opinion that the impugned portion of s. 41 of the Indian Army Act, 1911, was *intra vires* the Indian Legislature. The appeal fails and is dismissed.

— *Appeal dismissed.*

1. [1928] A.C. 143 at 156
2. [1938] A.C. 173

Criminal Revision Case No. 116 of 1946
Case Referred No. 5 of 1946
March 19, 1946

HORWILL & SHAHABUDDIN, JJ.

Neeladri Appadu & others In re.

Cr. P. C. (V of 1898), S. 421—Dismissal of jail appeal — Subsequent appeal through counsel—If entertainable.

The dismissal of a jail appeal is a bar to the hearing of another appeal in the same case on merits.

A. I. R. 1934 *All.* 988. (1), not followed.

Case referred for the orders of the High Court under Section 438 Criminal Procedure Code, by the Sessions Judge of Vizagapatam division in his letter dated 16—1—1946 in Criminal Appeals 132 and 154 of 1945 on his file (H. C. J. No. 1126 of 1946.)

Assistant Public Prosecutor, for Crown.

ORDER

(SHAHABUDDIN, J.)

This is a reference by the Sessions Judge of Vizagapatam in respect of Criminal Appeals Nos. 132 and 154 of 1945 in his Court, which were filed by the respondents against the order of the Sub Divisional Magistrate of Vizianagaram in Miscellaneous Case No. 38 of 1945 on his file. In that case, it was alleged that the respondents were persons coming under clauses (a) and (f) of Section 110 of the Code of Criminal Procedure, and that they should be called upon to furnish security for good behaviour. The Magistrate believed the evidence adduced by the prosecution and directed the respondents to execute bonds in the sum of Rs. 100 with two sureties each, and as they failed to do so, he committed them to prison to undergo rigorous imprisonment for one year each. Criminal Appeal No. 132 of 1945 against this order was received from jail on 11th October 1945 and the learned Sessions Judge dismissed it summarily under Section 421 on the 19th October 1945. On the 23rd November the other appeal was presented in Court by Counsel on behalf of the same respondents against the same order. This was taken on file on 27th of November and notice was issued the same day. The learned judge, after hearing the case on merits, set aside the order of the Magistrate as far as respondents 1 and 2 were concerned and confirmed it as against the third respondent. When he dealt with the latter appeal, No. 152 of 1945, it was not brought to his notice that the same matter had already been disposed of by him under section 421 of the Code of Criminal Procedure. Discovering this later, he has made this reference. His letter of

reference does not indicate which of the two decisions he wants to be upheld. He however refers to a decision of the Allahabad High Court in *Lachaman Chamar* v. *Emperor* [1] stating that according to that decision, the dismissal of a jail appeal under Section 421 of the Code does not bar the hearing of an appeal filed by Counsel in the same matter.

The order in the latter appeal was in our opinion an order passed without jurisdiction. It is no doubt true that the decision of the Allahabad High Court referred to by the learned Judge, does contain observations in support of the view that the dismissal of a jail appeal does not bar the hearing of the appeal in the same case on merits, but those observations were based on the practice obtaining in that Court. It is, however, clear that the practice in this Court has been otherwise. In *in re Kunhamad Haji* [2] a Bench of this Court held that, where an appeal has been disposed of, the Court is *functus officio* and cannot hear the appeal again. The same view was taken by another Bench of this Court in *in re Soma Naidu* [3]. Following these two decisions, with which we respectfully agree, we hold that the order of the learned Judge in the later appeal was one without jurisdiction and has therefore, to be set aside.

In view of this conclusion, the order dismissing the earlier appeal of the respondents should normally stand; but, having gone through the judgment in the later appeal, we find that the learned Judge had strong reasons for not accepting the case for the prosecution as far as respondents 1 and 2 were concerned. In the circumstances, we consider that ends of justice require our interference. We therefore, in the exercise of our powers of revision, revise the order in the earlier appeal by allowing it as far as respondents 1 and 2 are concerned and setting aside the order of the Magistrate as against them. The order dismissing the appeal of the third respondent will stand. Respondents 1 and 2 will be released forthwith.

N.T.R.

Criminal Revision Case No. 132 of 1946
(Criminal Revision Petition No. 126 of 1946)

Feburary 5, 1946

KUPPUSWAMI AYYAR, J.

Narayana Ayyar In re

Cr. P. C. (*V of 1898*) S. 205—*Personal appearance of accused—Dispensing with.*

Even in a summons case it will be open to a Magistrate to insist upon the personal appearance of the accused. But then he will have to give reasons for the same.

Petition under Section 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Stationary Sub-Magistrate of Trichinopoly Town dated 28—12—1945 and passed in C. C. No. 2183 of 1945 on the petition put in on behalf of the accused under Section 205 Crl. Procedure Code dated 28th December 1945.

P. Narayana Kurup & S. Rajaraman, for Petr.

ORDER

The petitioner was accused of having committed offences punishable under Sections 323 and 324 I.P C. The procedure to be followed in such a case is as in a summons case. But unfortunately the magistrate happened to issue a bailable warrant, and having issued a bailable warrant, when the petitioner sought to have his personal attendance in court dispensed with, the Magistrate dismissed his application observing that the personal appearance of the accused cannot be dispensed with as in this case the prosecution of the accused was secured after the issue of a bailable warrant. The Magistrate was not justified in taking his stand on an incorrect order of his for refusing the application. Even in a summons case it will be open to the Magistrate to insist upon the personal appearance of the accused. But then he will have to give reasons for the same. Since he has not given any such reason in his order, it is set aside and the petition is remanded to him for considering the question whether there are sufficient grounds in this case for not dispensing with the personal appearance of the accused in spite of the fact that he committed the error of issuing a bailable warrant intead of treating the case as a summons case.

N. T. R.

1. [1934] A.I.R. All. 988 (1)
2. [1923] M.W N. 94; 46 Mad. 382
3. [1924] 47 Mad. 428

Criminal Revision Case No. 629 of 1945
(Criminal Revision Petition No. 587 of 1945)
December 20, 1945.
KUPPUSWAMI AIYAR, J.
Patchamatla Chinna Sathiraju
v.
Emperor

Defence of India Rules (1939) R. 56—Offence under.

A notification under R. 56 of the Defence of India Rules prohibited the holding of or taking part in public processions, meetings assemblies for or connected with the celebration of the Indian Independence day or the propogation of the Independence Pledge or for conducting a flag salutation in this connection.

Held, *merely holding a flag or standing in the street with a flag, there being no meeting or procession or flag salutation, did not amount to any of the acts prohibited by the notification.*

Petition under Sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the judgment of the Court of Session of West Godavari division at Ellore dated 16—7—1945 in C.A.No. 24 of 1945 (C. C. No. 11 of 1945. Sub Divisional Magistrate's Court, Bhimavaram).

P. Satyanarayana Raju, for Petr.

Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

The petitioner was convicted by the Sub Divisional Magistrate of Bhimavaram of an offence punishable under Rule 56(4) read with Rule 121 of the Defence of India Rules for having acted in defiance of an order passed by the District Magistrate of West Godavari under rule 56 of the said Rules. He was sentenced to one year's rigorous imprisonment. On appeal the sentence was reduced to six months simple imprisonment.

The charge runs thus :—

"That you, on or about the 26th day of January 1945, at Chinanindrakolanu village, in defiance of the order, dated 18—1—1945, of the District Magistrate, West Godavari, passed under Rule 56 of the Defence of India Rules, prohibiting the celebration of the Indian "Independence Day" by conducting a flag salutation" etc., attempted to conduct a flag salutation" by planting a tricoloured Congress flag in a public street near Ramalayam and thereby committed an offence punishable under Rule 56(4) read with Rule 121 of the Defence of India Rules."

All that has been found by the lower Courts was that the petitioner took a flag and stood in the street and that there was no meeting, no procession and no flag salutation. That is what the learned Sessions Judge in appeal definitely finds. The notification issued by the District Magistrate of West Godavari runs thus:

"In exercise of the powers delegated to him under Rule 56 of the Defence of India Rules, the District Magistrate, West Godavari for the purpose of securing the public safety, the maintenance of public order and the efficient prosecution of war, hereby prohibits the holding of or taking part in public processions, meetings or assemblies for or connected with the celebration of the Indian "Independence Day" or the propogation of the "Independence pledge" or for conducting any "flag salutation" in this connection, within the local limits of the West Godavari district."

It will be seen that what was prohibited was (1) the holding of or taking part in public processions, (2) meetings, (3) assemblies for or connected with the celebration of the Indian Independence Day or the propogation of the Independence Pledge, (4) or for conducting any flag salutation in this connection. In the charge the only thing mentioned is flag salutation and it is also stated that there was an attempt to conduct flag salutation. From the finding of the Sessions Judge it is clear that there was no flag salutation. He also says that there was no procession or meeting. So I am not able to see how the petitioner disobeyed the order of the District Magistrate. Merely holding a flag or standing in the street with a flag which is what the petitioner is said to have done, cannot be said to amount to any of the acts which are prohibited by the order of the District Magistrate.

I accordingly set aside the conviction and sentence and acquit the petitioner.

N.T.R. —

Referred Trial No. 60 of 1946 &
Criminal Appeals Nos. 287 to 289 of 1946
May 28, 1946
CHANDRASEKHARA AIYAR, &
KUPPUSWAMI AIYAR, JJ.

Nachimuthu Goundan & others In re

Penal Code (XLV of 1860), *S.* 34—*Proof of common intention.*

The decision of the Privy Council in 1945 *M W N.* 373: *Cr* 69 *does not rule out the possibility of a common intention developing in the course of events, though it might not have been present to start with: nor do their Lordships say that the intention cannot be inferred from the conduct of the assailants. The question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from the proved facts and not on any direct evidence about a preconceived scheme or plan which may not be available at all.*

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sen-

tences of death passed upon the said prisoners (Accused Nos. 3 to 5) in Case No. 22 of the Calendar for 1946 on 16—3—1946 & Appeals against the judgment of the Court of Session of the Coimbatore Division dated 16th March 1946 and passed in the said S.C. No. 22 of 1946.

K. S. Jayarama Iyer, C. K. Venkatanarasimham, K. Narayanaswami, V. V. Radhakrishnan & M. Srinivasa gopalan, for Accused.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT

KUPPUSWAMI AIYAR, J. The Referred Trial relates to the sentence of death imposed on accused 3 to 5 in Sessions Case No. 22 of 1946 on the file of the Court of Session of the Coimbatore Division. Criminal Appeal No. 287of 1946 is by accused Nos. 1 to 3 of whom accused 1 and 2 had been sentenced to transportation for life for the murder of the deceasde Abdul Kassim Sahib, a constable attached to the Tirupur Police Station. The third accused was given the sentence of death for the same murder. The other two appeals are appeals by accused Nos. 4 and 5 who have been sentenced to death for the murder of the said Kassim Sahib.

P. W. 5 is the father of accused 1 and 2. The third accused is the nephew of P. W. 5. The fourth accused is a brother of P.W. 5 and the fifth accused is a brother-in-law of the fourth accused. Unfortunately, the relationship between the father (P. W. 5) and the two sons (accused 1 and 2) was not happy. A couple of months prior to the occurrence accused 1 and 2 happened to leave the house taking with them about Rs. 200. They returned home and there was a quarrel between the father and the sons about the return of the money which they had taken away. P.W. 5, the father and P.W. 6 went to the police station at Tirupur and gave a report to the Sub Inspector, Exhibit P. 16, on 1st December 1945. Therein P. W. 5 stated that he feared violence and even murder at the hands of accused 1, 2 and 4 and therefore wanted police bundobust. The Sub-Inspector deputed the deceased Abdul Kasim Sahib, a constable attached to his station to go and fetch accused 1 and 2. The deceased accompanied by P. Ws. 5 and 6 came in a cart to the village to which P.W. 5 and his sons (accused 1 and 2) belonged and wanted the first and second accused to go with him to the police station at Tirupur. P.W. 10 is the bandyman who is said to have driven the cart in which the three people went. The third accused who is a cousin of accused 1 and 2 asked the constable to leave the boys as it was only a minor quarrel but he would not. He wanted bail but there was no one to give bail. Accused 4 and 5 also subsequently came and tried to intercede but in vain. The two young men, accused 1 and 2 accompanied by the constable, went in the cart driven by P W. 10, towards Tirupur. They went as far as Kovilvali. In the meanwhile accused 3, 4 and 5 who were disappointed in their not having been able to retain the two young men in the village got very much annoyed and started towards the bandy in spite of the fact that they were advised not to go and interfere. They were able to overtake the bandy. One of them accused 3 or accused 4 is said to have stated that he would give a sound thrashing to the constable and finish him and take the two boys. The bandyman was attacked and after receiving some injuries got down. Then accused 1 and 2 got down from the bandy. The deceased also got out of the bandy and was belaboured. He fell down; and attempted to escape. Then all the five of them chased him and beat him with sticks and stones, some of the stones being of the size of a man's hand. The deceased died and the assailants went away. This is said to have been witnessed by P.Ws. 14 15 and 16. P.W. 10, after the deceased fell down, ran to the police station and gave information that the constable was being badly handled by these assailants. It was about 9-45 P. M. when this information was given by P. W. 10. The police thereupon went to the place, made an investigation and arrested the third accused who gave the confessional statement (Exhibt P-4). Accused 4 and 5 were subsequently arrested and they too gave confessional statements (Exhibits P-7 and P-6) on 8th December 1945. Accused 1 and 2 were later on arrested and they gave statements (Exhibits P-9 and P-10) on 11th December 1945.

All these accused in their statements admitted that accused 1 and 2 were taken by the constable (the deceased) to the station in the cart driven by P. W. 10 that they all beat the constable and that he died. Besides the confessional statements of these five accused, there is the evidence of P. W. 10, and P. Ws. 14 to 16 who are said to have witnessed the occurrence. The learned Sessions Judge accepting the evidence of the eye witnesses and also the confessional statements—which statements though they were not admitted in the committing magistrate's court were admitted in the Sessions Court—found all of them guilty of an offence punishable under section 302 read with Section 34 of the Indian Penal Code for the murder of the

deceased Abdul Kassim Sahib and sentenced accused 1 and 2 to transportation for life and the other accused to the extreme penalty of law.

Before us the fact that these accused beat the deceased and caused him injuries and he died in consequence, and the facts that these accused made these confessional statements are not disputed. Apart from the evidence of P. Ws. 14 to 16 and the evidence of the cartman, P.W. 10, there is the evidence furnished by these confessional statements which completely go to prove that the constable did take accused 1 and 2 in the cart driven by P. W. 10 towards the police station, that accused 3 to 5 subsequently came with a view to rescue these two boys and that all of them joined together and caused injuries as a result of which the deceased died. But what is urged before us is that this is not a case to which the provisions of section 34 of the Indian Penal Code can be applied and that it cannot be said that there was any common intention to kill justifying a finding that all these accused are guilty of murder. The medical evidence shows that though there were as many as 27 injuries on the person of the deceased and several of them were serious injuries, there was only one injury which was necessarily fatal, namely the injury to the head. There is no evidence to show which of these accused it was that caused the particular injury. It is therefore urged since there is no evidence that the fatal injury was caused by which of these accused and if the provisions of Section 34 of the Indian Penal Code cannot be availed of, none of these accused could be said to be guilty of the offence of murder. It is true there is no specific direct evidence to prove that all these five accused set out with a pre-arranged understanding that they should kill the deceased and that it was in pursuance of such common understanding that the deceased was killed. But we have evidence in this case, about the truth of which there is no dispute before us, namely that after accused 1 and 2 were taken in the cart by the deceased, leaving accused 3 to 5 in the village, the latter three persons subsequently went towards the cart and overtook the cart, that one of these three persons at the time when they reached the cart said that they will have to give a sound thrashing to the constable and even finish him and it is after this was said all the accused belaboured the deceased and even after the deceased fell down all the five of them beat him and left him only after he was dead. From these circumstances it is urged for the prosecution that is clear that all these persons who belaboured the deceased, chased him and caused him as many as 27 injuries, and did so in pursuance of what was stated by one of the accused, namely that they should belabour the deceased and finish him. The words 'finish him' is clearly indicative of the fact that he wanted the deceased to be killed and it was only after he had given this direction that all the accused did the acts which resulted in the death of the deceased, These circumstances are enough to indicate that all the accused acted in pursuance of a common intention to kill and that all these acts were done as the result of a common intent to kill; and when that was so, this is a case to which the provisions of Section 34 could be availed of by the prosecution. The case reported in *Mahabub Shah* v. *Emperor* (1) has no application to the facts of this case. There, there was nothing to indicate that there was a common intention. The question as to whether there was a common intention is a question of fact and has to be decided with regard to the facts of each case. In this case the conduct of the assailants and the direction given by one of these accused they should give a sound thrashing and finish the deceased just before the others took part in the attack, go to show that there was a common intention and it was in furtherance of that common intention that they beat the constable who died as a result of such beating. It is true the doctor deposed that he could not state if the deceased would have died if the fatal injury to the forehead had not been caused. But the fact that none others except these accused were there and they could have caused that injury is clear from the evidence. Therefore it must hate been one of these accused who had caused the injury and if he was one of the persons who shared the common intention to kill and they all did various acts and if the act of one resulted in the death of the deceased, then all the accused would be guilty of the offence of murder. We, therefore, agree with the learned Sessions Judge that this is a case in which he will be justified in finding that all the accused are guilty of an offence punishable under section 302 read with section 34 of the Indian Penal Code.

Then the only other question is as regards the sentence. Accused 1 and 2 who were as much responsible as the others who went to the relief of the former two, have been given the sentence of transportation for life by the learned Sessions Judge evidently on account

1. (1945) M.W.N. 373 : Cr. 69

of their youth. With regard to the others it is true they are elderly persons who ought to have behaved better; but then it must be remembered that there is evidence to show that at the time when they left the village and started on this errand to rescue the two boys they had no other idea except to rescue the boys. This is clear from the evidence of the Asari (P. W. 12). The learned Sessions Judge also points out that it was only subsequently when they went, that the murderous intent must have got into their minds; and when three of them were acting in a frenzied manner and did the various acts, they cannot be said to be premeditated acts. The learned Judge also finds that the fatal injury must have been caused by one of the assailants but that it cannot be said which of them caused that injury In these circumstances we think this is a case in which the lesser sentence should be imposed on accused 3 to 5 as well. We accordingly confirm the conviction and sentence on accused 1 and 2 but while confirming the conviction of accused 3 to 5 reduce the sentence on each of them to one of transporation for life.

Chandrasekhara Aiyar, J.—I agree with the conclusions reached by my learned brother in his judgment just now pronounced but wish to add one or two words on the applicability of section 34 of the Indian Penal Code. The Privy Council decision reported in *Mahbub Shah* v. *Emperor* (1) was pressed into service by the learned counsel for the appellant to support the argument that as it could not be predicated in this case that there was any common intention on the part of the five accused to kill the police constable and as the learned Sessions Judge has only found that they must be fixed with knowledge that what they were doing was so imminently dangerous that it must in all probability cause death, the appellants cannot be held guilty of murder as there was only one injury, namely the fracture of the forehead which alone, according to the doctor, was necessarily fatal and it might have been caused by a stone hit. The decision of the Judicial Committee is warrant only for the proposition that it is not enough to attract the provisions of section 34 of the Indian Penal Code that there was the same intention on the part of several people to comnit a particular criminal act or a similar intention but it is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants. As my learned brother has pointed out the question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from the proved facts and not on any direct evidence about a pre-conceived scheme or plan which may not be available at all. The question, therefore, is whether on the facts proved in this case we can say that there was such a common intention. If we accept the first information report, Exhibit P-18, corroborated by the testimony of P. W. 10 who gave the information and who was driving the bandy when it was set upon by accused 3, 4 and 5, and also what is stated by Nachimuthu Goundan (third accused) in his confessional statement (Exhibit P-4) where he tells us that the fourth accused exclaimed as soon as they reached the cart "Beat the policeman and do away with him", there can be no difficulty in saying that the subsequent acts of brutal beating administered to the constable, not only when he got down from the cart but after he was pursued to a distance of about 100 yards, were due to a common intention on the part of all to "kill him". In taking this view we give full effect to the interpretation given in the judgment of the Privy Council to the words "common intention" in section 34 of the Indian Penal Code, and steer clear of it.

N.T.R.

Criminal Appeal No. 143 of 1945

July 10, 1945

HAPPELL, J.

The Public Prosecutor

v.

Vedakattu Venkata Narayana & another

Hoarding & Profiteering Prevention Ordinance (XXXV of 1943), S. 6 (2) (b) (ii)—Interpretation of.

Under S. 6 (2) (b) (ii) of the H.P.P. Ordinance the governing factor is the price at which the producer sold the article and not the cost of the article to the dealer. Therefore for the purpose of calculating whether the price at which the dealer had sold the article was within the 20 per cent addition to the price at which the producer sold the article, it is not permissible to add to the price at which the producer sold, the expenses incurred by the dealer, such as freight, forwarding charges, etc.

Appeal under section 417 of the Code of Criminal Procedure 1898 against the acquittal of the aforesaid Respondents (Accused) by the Additional Sessions Judge of the Court of Session of the East Godavari Division in Criminal Appeal No. 126 of 1944 on his file (C.C. No. 10 of 1944 Additional District Magistrate of East Godavari Cocanada)

Public Prosecutor for Crown.

V. T. Rangaswami Ayyangar & K. Kalyanasundaram for Accused.

JUDGMENT

This is an appeal by the Provincial Government against the acquittal of the two accused in C.C. 10 of 1944 on appeal by the Additional Sessions Judge of East Godavari. The appeal raises the question of the proper construction of section 6 sub-section (2) clause (b) (ii) of the Hoarding and Profiteering Ordinance. The first and second accused were respectively the proprietor of and the salesman employed in a shop known as the City Emporium in Cocanada. The charge against them was that they had sold a hat for Rs 7 which had been sold by the producer for Rs. 5-4-0 or even less and so had added more than 20 per cent to the cost price in contravention of the provisions of section 6 of the Hoarding and Profiteering Prevention Ordinance. The Howrah Hat Manufacturing Company of Delhi had agreed to supply the City Emporium with 6 Ajanta Hats, the hat in question in this case is one of these 6, for Rs. 63 per dozen F.O.R. Cocanada. It transpired, however, that the hats could not be sent by goods train and, consequently, the Howrah Hat Manufacturing Company proposed that if the City Emporium was willing to have the goods sent by Passenger train they would send them in that way, deducting the cost of freight by goods train and leaving the City Emporium to pay the passenger freight. The Emporium accepted this proposal and in consequence they paid the Howrah Hat Manufacturing Company at the rate of Rs. 63 less Rs. 3—4—0 for one dozen hats and themselves paid the M. & S. M. Railway Rs. 11—8—0 for the passenger freight in respect of the hats. The contention of the accused was and is that the first accused was entitled, for the purpose of calculating whether the price at which he had sold the article was within the 20 percent addition to the price at which the producer sold the article to add to the price at which the producer sold the article the expenses incurred by him such as freight, forwarding charges and so forth. The learned Additional District Magistrate did not accept this contention. He held, therefore, that the price for which the hats were sold constituted an addition of more than 20 per cent to the price at which the article had been sold by the producer. He consequently convicted the accused and sentenced the first accused to pay a fine of Rs. 700 and the second accused to pay a five of Rs. 500. The Additional Sessions Judge took the other view and, holding that the first accused was entitled to charge for the hat 20 per cent in excess of the cost to him of the hat which in his view would include the cost of freight and other expenses such as forwarding charges and bank collection charges, found that there had been no contravention of the provisions of section 6 and accordingly acquitted the accused.

For the purposes of this case it is conceded that the relevant provision of section 6 of the Hoarding and Profiteering Prevention Ordinance is section 6 sub-section (2) clause(b)(ii) by which it is provided that a consideration is unreasonable if, when the sale is by a dealer, it exceeds the amount represented by the addition allowed by the normal trade practice in force on the 31st day of August 1939 to "the price at which the producer sold the article, in the case of an article which is not imported" subject to the proviso that if the addition allowed by normal trade practice exceeds 20 per cent, the dealer must report the fact to the Controller General and take his orders. In effect, in this case, as there is no proof of any normal trade practice, the question is whether the price at which the hat was sold exceeded the price at which the producer sold the article by more than 20 percent. The learned Additional Sessions Judge, it seems to me, has not kept his mind on the plain words of section 6 (2) (b) sub-clause (ii) of the Ordinance but has been inclined to treat the case as if the governing factor was not the price at which the producer sold the article but the cost of the article to the dealer. In the present case there is no dispute that the producer was paid only at the rate of Rs. 59-12-0 for twelve hats and, that being so, the sale of the hats at Rs. 7 each added more than 20 per cent to the price at which the producer sold the articles. The producer was not paid the cost of the carriage of the hats by passenger train and it is quite impossible to say—as the learned Additional Sessions Judge in fact does—that the price at which the producer sold the article may be something more than the price actually paid to the producer. According to the calculations of the learned Additional Sessions Judge Rs. 76-10-0 must have been the price to the dealer per dozen, but it was not the price at

which the producer sold the articles for, as already pointed out, all that was paid to the producer for a dozen articles was Rs. 63 less Rs. 3-4-0 which was deducted in respect or the freight that was to have been charged for the carriage of the articles by goods train. It follows, therefore, that on a proper construction of section 6 the price for which the hat was sold Rs. 7 constituted an addition of more than 20 percent to the price at which the producer sold the hat. That being so, the conviction of the accused by the Additional District Magistrate was right.

The appeal is allowed and the accused are convicted of the offences with which they were charged. With regard to the appropriate penalty, I think that in the circumstances of the case it will be sufficient if I impose on the first accused a fine of Rs. 250 with two months rigorous imprisonment in default of payment. With regard to the second accused, as he was a mere salesman and the first accused is before the Court and has been punished, a lighter penalty will suffice. He is sentenced to pay a fine of Rs 10 and, in default of payment, to undergo two weeks rigorous imprisonment.

N.T.R. —— *Appeal allowed.*

Civil Revision Petition No. 705 of 1945

April 26, 1946.

BELL, J.

Chinnasami Thanjiroyar
v.
Pichai Maricar.

Contempt—Witness in civil suit—Direction to produce accounts—Failure—If punishable—Criminal Procedure Code (V of 1898), ss. 480 & 485.

Petitioner was a witness for the plaintiff in a civil suit. During his examination it emerged that he had some accounts which might throw light upon the issue between the parties. He had not the accounts with him and the District Munsif ordered him to produce them in court on another day. Petitioner neither appeared in court again nor produaed the accounts.

Held, *that ss. 480 and 485, Cr. P. C. did not apply to the case and that there was no jurisdiction in the court to summarily impose a fine upon the petitioner for non production of the accounts.*

Petition under Section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of East Tanjore at Negapatam dated 16-12-1944 and made in Civil Miscellaneous Appeal No. 21 of 1944 (I.A. 80 of 1944 in O.S. No. 252 of 1942, D.M.C. Tiruturaipundi).

R. Viswanathan & S. Ramachandra Iyer, for Applt.

K. V. Ramachandra Iyer, for Respt.

JUDGMENT

This petition arises out of an order made by the District Munsif of Tiruturaipundi inflicting a fine of Rs. 50 on the petitioner who had appeared as a witness for the plaintiff in a suit before him. The petitioner vainly appealed to the District Judge of East Tanjore. He therefore comes to this Court on the ground that the District Munsif had no jurisdiction to impose a fine and that therefore the District Judge was wrong in confirming such an order.

A preliminary objection was taken on behalf of the respondent that in such a matter only one appeal is allowed and reference was made to Section 104 (h) of the Civil Procedure Code. This section however, refers to an order imposing a fine and made under the provisions of the Code. As I hold that the order was not made under any of the provisions of the Code and that the learned District Munsif had no jurisdiction, this section does not apply and the objection must be overruled.

The question is whether the District Munsif has power to punish in respect of contempt of Court in circumstances such as appear in this case. The petitioner, as stated, was a witness for the plaintiff in a suit. During his examination it emerged that he had accounts of some kind which might throw light upon the issue between the parties. He had not the accounts with him and the District Munsif ordered him to produce them in Court on another day. The petitioner apparently took no notice of this direction and neither appeared in court again nor produced the accounts. The District Munsif, who had apparently taken a very unfavourable view of the petitioner's demeanour in the witness-box had no difficulty on an application made by the defendant, the present respondent, in regarding his disobedience as directly in contempt of the order to produce the accounts. He therefore imposed the fine and in default ordered that the petitioner's property should be attached and sold.

The learned District Judge confirmed the order and held that the Court can punish contempts which take place "under its nose in proceedings before it". He cites as authority for this proposition section 480 and 485 of the Criminal Procedure Code. It is not necessary to set out these sections at length and it is enough to say that they relate to offences committed in the view or presence of the Court by a witness or a person called to produce a document before a criminal court who refuses to do so and

offers no reasonable excuse for his refusal. In such cases the Court may institute proceedings against him in accordance with the Code.

The facts here were different. This was a civil suit and one of the parties had chosen to call the petitioner as his witness. It is difficult to understand how the plaintiff or his counsel was unaware of the existence of these accounts if they had any relevance to the case. It appears to have been a matter entirely for the plaintiff. In a civil suit the court is not sitting to do some kind of abstract justice but it is there to decide the issues between the parties on the evidence, oral and documentary, which they care to produce. Where a witness discloses, accidentally perhaps and may be to the surprise of the counsel who has called him, that he has in his possession books of account which may throw light on the case, it is for that counsel to take steps to see that they are produced as soon as possible lest their non-production, after the fact of their existence has been stated by his own witness, leaves the court to draw an inference against his client and endangers his whole case. It is not a matter for interference by the Court, beyond, may be a suggestion that the party concerned, that is to say, in this case the plaintiff, might do well to cause the production of the books.

If either party needs the assistance of the court in procuring documentary evidence the court may make orders in accordance with the rules. See Order XIII and Order XVI, C.P.C. In proper cases the Court may inflict penalties on those who disobey orders made in accordance with the rules. The court has of course power to require persons present in court to give evidence or to produce documents which they may have then and there in possession or power: Order XVI rule 7. The Court does not of its own accord issue a summons under Order XVI, rule 10

Section 165 of the Evidence Act gives a Judge wide powers in the conduct of a case, criminal or civil, and enables him to order the production of any document. The Section provides however that a witness cannot be compelled to produce any document which he would be entitled to refuse to produce under sections 121 to 131 if the document were called for by the adverse party. In this case it does not appear that the learned District Munsif considered that he was acting under the provisions of section 165 of the Evidence Act, for, as appears from his order, the matter first arose over a reference by the witness to a note made by him in a private diary. Later he was questioned whether he maintained accounts of his family income and expenditure and the witness replied in the affirmative, whereupon the court directed him to produce such accounts the next day. There was no discussion whether the witness could have refused to produce such documents, or about the precise relevance of such accounts to the suit before the Court.

In my opinion, on the facts as they appear from the judgments of the two lower courts, the matter really became one of inadequate preparation of the plaintiff's case in that a witness was called without the plaintiff's counsel knowing of the evidence which he would be able to give, or, on the other hand, in that he knew what the evidence was but was prepared to suppress some part of it. In such circumstances, in my opinion, the Judge would have been entitled to draw whatever inference he considered right from the circumstances. I can find nowhere any authority for the proposition that he could summarily inflict a fine upon the petitioner for non-production of his private and family accounts.

Much stress was laid by the respondent-defendant in the suit, who in fact initiated the proceeding against this witness, on the views put forward in *Chunni Lal* v. *Emperor* (1). The facts there were certainly not unlike those in the present case. The learned Judge says:

> "When the witness or party is present, and the Court directs him by word of mouth to do a certain act, and there cannot be the slightest mistake as to the witness or the party having received information of such direction, it will be merely making a travesty of procedure to insist upon the Court issuing a summons to a witness who is present followed by a proclamation to the witness who is still present, and then attaching his property to make the witness who is present before the Court understand that a document is wanted from him.

One may sympathise indeed with such a view, but the question is whether the rules provide for such a summary procedure as was followed in that case and in this. With the greatest respect I cannot find any provision in the Code or elsewhere entitling the District Munsif to make the order against which complaint is made. In my opinion the order of the District Munsif must be set aside, the fine remitted and this petition allowed with costs throughout.

N.T.R. — *Petition allowed.*

1. (1929) A.I.R. All. 99

Referred Trial No. 15 of 1946
Criminal Appeals Nos. 158 & 123 of 1946
Criminal Revision Case No. 307 of 1946.
(Taken Up No. 1 of 1946)
April 18, 1946
HORWILL & SHAHABUDDIN, JJ.

Patan Allikhan
v.
Emperor

Criminal Procednre Code (V of 1898), S. 367 —Successor, if can pronounce judgement of predecessor.

In a Sessions case, the evidence was recorded and arguments heard by the Sessions Judge, N. Thereafter, he handed over charge to P, who had been appointed to another Sessions division, but did not join immediately. At the time when P was the judge, N wrote out a judgment of conviction and handed it over to P who pronounced it in open court on behalf of N.

Held, *that S. 367, Cr.P.C., did not authorise the succeeding judge to pronounce the judgment of his predecessor. The moment N handed over to P, he became* functus officio *and had no jurisdiction to write a judgment; and P. had no jurisdiction to pronounce judgment based on evidence recorded by N. Therefore what purported to be a judgment was not a judgment and the defect was not cured by s 537 and there was no lawful conviction of the accused.*

The judge who writes and pronounces the judgment should have seen the witnesses and heard the evidence for himself.

18 M.L.J. 197, doubted

Trial referred by the Court of Session of the Chittoor Division for confirmation of the sentence of death passed upon the said Prisoner (1st Accused) in case No. 38 of the Calender for 1945 on 15-1-946; and Appeals respectively by the Appellants abovenamed (Accused Nos. 1 and 2) against the judgment of the Court of Session of the Chittoor Division dated 15—1—1946 and passed in the said Sessions Case No. 88 of 1945 and Case taken up by the High Court on perusal of the Calendar and judgment in Sessions Case No. 38 of 1945 on the file of the Court of Session of the Chittoor Division.

V. Rajagopalachari, K. S. Jayarama Ayyar, A. Bhujanga Rao, M. Sundaram & S. A. Soshadri Ayyangar for Accused.

Public Prosecutor & Assistaut Public Prosecutor for Crown.

JUDGMENT
(Horwill, J.)

In the Court of the Sessions Judge of Chittoor there were four accused. The first was charged under section 302 of the Indian Penal Code with the murder of one Bandi Ramalingappa. The other three were charged under the same section read with Section 109 of the Code with abetment of the murder. There was also a minor charge against the fourth accused of voluntarily causing hurt. The first accused was found guilty as charged and sentenced to death. The second accused was found guilty of abetment of murder and sentenced to transportation for life. The third and fourth accused were acquitted. The first and second accused have appealed.

It has been argued as a preliminary point that there was no legal conviction of the two appellants; because the judgment was written by a judge having no jurisdiction to write the judgment and pronounced by a judge who had not heard the evidence. The facts on which this argument is based are these: the evidence was recorded and arguments heard by Mr. Nainar. Thereafter, he handed over charge to Mr. Panchapakesa Aiyar, who had been appointed to relieve him at Chittoor. Mr. Nainar had been appointed to the Guntur Sessions division; but did not join immediately and was not in charge of it on any of the material dates. On the 12th January, 1946, the day after he had completed the hearing of the case, Mr. Nainar dictated the judgment to the shorthand writer in the Judge's Bungalow. At that time, Mr. Panchapakesa Aiyar was the District Judge. Mr. Nainar probably received the type script of the judgment on the 14th January, on which day he corrected it, signed it, and dated it and handed it over to Mr. Panchapakesa Aiyar, who pronounced it in open Court on behalf of Mr. Nainar on the 15th of January. The question is whether the circumstance that at the time of writing this judgment and at the time of pronouncing it M. Nainar was not the Sessions Judge of Chittoor renders the judgment of no avail and makes the orders passed void.

The case of the appellants is a very simple one. They argue that Mr. Nainar became *functus officio* on the 11th of January when he handed over charge to Mr. Panchapakesa Aiyar and that thereafter he had no jurisdiction to write a judgment and Mr. Panchapakesa Aiyar had no jurisdiction to pronounce it; the judgment which Mr. Nainar wrote and signed was not a judgment but merely a memorandum of his personal opinions which had no judicial effect. The learned Public Prosecutor, on the other hand, has pointed out the distinction drawn in the Code between a trial and a judgment and has sought to contrast the strict requirements with regard to a trial with the relative informality of the rules

regarding the pronouncement of judgments. He concedes that it is a fundamental rule of Criminal Jurisprudence that the judge who heard the evidence should write the judgment, but he argues that it is a matter of little consequence who actually pronounces the judgment in Court and that it was of no importance whether Mr. Nainar was actually in possession of the office of Sessions Judge, Chittoor, on the dates when he wrote the judgment and Mr. Panchapakesa Aiyar pronounced it. He has referred to certain decisions in civil matters in which it has been held that even though a Judge might be on leave or on vacation or in a new station he could write the judgment for his successor to pronounce. He argues that Section 367 Cr. P. C. does not enjoin the pronouncement of a judgment by the Judge who wrote it and that on a strict reading of Section 367 Cr.P.C. no irregularity, still less an illegality was committed; and that if any irregularity or illegality was committed, it could be cured by Section 537 Cr. P. C.

In view of this divergence of interpretation of Section 367 Cr. P. C. it is necessary to enquire to what extent it was thought necessary before the Codes of Civil and Criminal Procedure took their present shape that the judge who heard the evidence should write the judgment and pronounce it, and how far the procedure has since been modified. It seems to us that such provisions as Or. XVIII rule 15, C. P. C. which permits a succeeding judge to use the evidence recorded by his predecessor and Order XX rule 2, which authorises a Judge to pronounce a judgment of his predecessor, suggest that without such rules it would be necessary for the same judge to hear the case from beginning to end and to pronounce the judgment. We are indebted to Mr. Jayarama Aiyar for drawing our attention to some of the older Codes and the decisions based upon them, so that we might see what Judges thought on these matters when the requirements of the Civil Law and the Criminal Law were the same. The rules enunciated under Order XVIII, rule 15 and Order XX rule 2 were introduced into the Civil procedure in the Code of 1877. In the earlier Code of 1859 we do not find any corresponding rules. Mr. Jayarama Aiyar has drawn out attention to Nelson's Commentaries on the Code of Criminal Procedure, a book written in 1873. Certain passages in the Commentary on the then sections 463 and 464 proceed on the basis that the law relating to Criminal procedure is the same as that relating to civil procedure; and we have verified the references made therein to the proceedings of this Court. In the proceedings of the Madras Suddar Court dated the 11th June 1861, it was said:-

> "If after a judge has left the Conrt, it be found that in any suit brought to a final hearing no written judgment has been placed on record by him, his successor must hear and decide the suit, notwithstanding that such judge may have pronounced judgment in the case and made a brief note of his decision."

In the proceedings of the Madras Suddar Court of the 7th August 1849 it was said:-

> "Judgments written by a Civil Judge but not pronounced in open Court, cannot, in the event of his removal before pronouncing the same, be published by his successor, but the cases must be re-investigaed."

After reference to certain English cases, the learned Commentator added:-

> "When a judge, after writing his judgment, but before delivering it in open Court dies, or leaves the bench, his written judgment is not to be considered as a judgment, but merely as an opinion."

In *Mahomed Akil* v. *Asadun nissa Bibee* (1), a Full Bench of learned Judges of the Calcutta High Court were considering the effect of a number of judgments written by members of the Bench and left in the office of the Registrar in accordance with the practice then prevailing: and the learned judges who pronounced the judgments of the Court held that the so called judgments left in the office of the Registrar were not judgments at all but merely memoranda of the opinions of the Judges who left them. It was pointed out that although those learned Judges had expressed their opinion with some finality in those judgments, it was not at all improbable that if they had had the benefit of reading the judgments of the members of the Bench and had sat with them and pronounced their judgments with them they might well have been led to decisions differing from those expressed in the judgments left in the office.

In *Naranbhai Vrijhbukan Das* v. *Naroshankar Chandroshankar* (2) the learned Judges were considering an objection taken before them to the procedure adopted by a Munsif in acting upon the evidence recorded by the Principal Sudder Ameen and were of opinion that the Munsif had no jurisdiction to do so and had acted illegally. They pointed out that it was incumbent on every Judge to act upon the evidence of persons whom he had heard and seen for himself. One of the learned Judges, Tucker J, put the matter in this way:

> "If appears to me that one of the main underlying principles of the Code of Civil Procedure is that, at

1. 9 Weekly Reporter 1
2. 4 Bom. H.C.R. 98 (Appellate Civil Jurisdiction)

an original trial, the Judge who decides the cause shall have personally heard the evidence of the witness, on whose testimony his judgment is to be based, except in certain specified instances; and I cannot find that it is anywhere contemplated that a Judge of a Court of first instance should pronounce judgment on evidence taken before a predecessor in the same Court, or before a Judge of any co ordinate tribunal from which a part heard suit ma yhave been removed.

I consider, therefore, that when a Judge of a Court of original jurisdiction. whose proceedings are regulated by the Code of Civil Procedure, dies, or is removed to another appointment, before the conclusion of a trial, or where a partially tried suit is removed from one court to another, the evidence of the witnesses, who have been examined by the Court which commenced the inquiry must be taken *denovo*, unless the parties consent that the depositions already recorded shall be read at the hearing before the Judge or Court on whom it will devolve to pass judgment."

The other judges expressed similar opinions. If that is the law with regard to civil suits, then the procedure for the conducting of criminal trials cannot be less strict; for it is even more necessary, in criminal cases that the Judge who writes and pronounces the judgment should have seen the witnesses and heard the evidence for himself.

No cases have been cited by the learned Public Prosecutor which suggest that prior to 1877 it was considered permissible in either civil or criminal cases for a Judge to pronounce a judgment he had not written or which was not based on evidence heard by him entirely. The importance of the judges hearing the evidence of witnesses and observing their demeanour has been emphasised in many decisions and the possibility pointed out of the Judge's changing his opinion at any time before he actually signs the judgment pronounced by him. It will be seen from the above analysis that the original law was that the Judge who writes and pronounces a judgment must be the judge who hears all the evidence. This must still be deemed to be the law, except in so far as it has been modified by the legislature from time to time. We have already referred to the provisions of Order XVIII, rule 15 and Order XX, rule 2 of the C.P.C. which modified the law in civil cases. If there are no corresponding provisions in the Cr.P.C., we shall be compelled to conclude that the earlier rule prevails. In *Kunhammad Haji, In re* (3) this Court had to consider whether a criminal court had any powers of review similar to those possessed by Civil Courts by virtue of Order XLVII of the Code of Civil Procedure. The learned Judges pointed out that the Criminal Procedure Code had been passed after the Civil Procedure Code and had been amended many times, and held that since no powers for review were expressly given in the Criminal Procedure Code, it must be presumed that no such power exists. In the same way, we must hold that unless the Code of Criminal Procedure expressly provides for the pronouncement of a judgment by a Judge other than he who recorded the evidence, a succeeding Judge would have no power to do so.

One modification of the original strict rule was introduced into Section 350 of the present Code, which permits a succeeding magistrate exercising jurisdiction to act upon the evidence recorded by his predecessor or partly recorded by him; but even that modification is hedged round by provisos which give an accused person a right to demand that the witnesses or any of them should be re-summoned and reheard There is admittedly no corresponding provision relating to sessions trials: but it is argued that Section 367 of the Code also modifies the ancient rule and permits a judgment written by one Judge to be pronounced by his successor. Sub-section (1) of section 367 of the Code reads:

"Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court . . . . in the language of the Court . . . and shall contain the point or points for determination, the decision thereon, and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court, at the time of pronouncing it."

If in each case where the term 'presiding officer' is used, it refers to the 'presiding officer' who happens to hold the office at the time when the relevant act is done, then Section 367 would appear to justify the writing of the judgment by the officer who was presiding over the Court at the time when the judgment was written and the pronouncement of the judgment by the Judge who happened to be holding office at the time of the pronouncement. In other words, a Judge who had not heard any of the evidence or any of the arguments could write the judgment because he happened to be presiding over the Court at the time when the judgment was written. The learned Public Prosecutor agrees that this interpretation cannot be put on section 367 Cr. P.C., as it would lead to gross violation of the fundamental principle of criminal law that the judge who hears the evidence should write the judgment. He therefore asks us to read section 367 of the Code as if the presiding officer first-referred to was not the presiding officer at the time of writing the judg-

3. (1923) M.W.N. 94: 46 Mad. 382

ment, but the presiding officer at the time of the recording of the evidence and the hearing of the arguments and the second presiding officer the officer presiding at the time of the pronouncement of the judgment. That would necessitate the use of the words 'presiding officer' in two different senses in the same sub-Section, a violation of an accepted principle of interpretation of statutes. We are therefore driven to conclude that the presiding officer referred to in Section 367 (1) Cr. P. C. in both cases means the presiding officer at the trial, who is assumed in the Section to have written and pronounced his judgment while still holding the same office.

The learned Public Prosecutor has, however, a certain amount of authority in support of his argument. In *Sankara Pillai*, in re (4) the learned Judges had to consider whether a magistrate who delivered a judgment that his predecessor had intended to deliver and would doubtless have delivered if he had not been transferred, had jurisdiction to do so. The learned Judges disposed of the matter very briefly by referring to Section 367 Cr. P. C. and saying that there was nothing in that section which suggested that the judge who pronounced the Judgment had to be the same as the judge who wrote it. They did not consider this section in conjunction with the rest of the Code, nor did they consider the principles underlying the procedure in criminal cases. Later, the matter came up before this Court again in a slightly different form in *Re Savarimuthu Pillai* (5). The facts there were similar to those in *Sankara Pillai, In Re* (4) except that in the later case the succeeding magistrate declined to pronounce the judgment and decided to hear the evidence afresh. The question before the learned Judges was whether he had jurisdiction to do so. The case of *Sankara Pillai, In Re* (4) was considered by the learned Judges, who seemed to think that the earlier decision could be justified only on the supposition that the succeeding magistrate adopted the judgment of his predecessor as his own. The learned Judge who delivered the leading judgment said:—

"Whatever action he takes must be under Section 350 (1) which leaves it to his discretion. There is no specific provision in the Criminal Procedure Code corresponding to Order XX rule 2, of the Code of Civil Procedure, under which it might be argued that the Second Judge was merely the mouth piece of the first. A Magistrate who pronounces a judgment of his predecessor must in my opinion be taken to adopt it as his own."

That would mean that the second magistrate could adopt the judgment as his own only if he were entitled—as perhaps a magistrate is entitled by virtue of section 350 (1) Cr.P.C.—to deliver a judgment based on evidence recorded by his predecessor. That cannot be done in a sessions case to which section 350 (1) would not apply. Moreover, it is clear in this case that Mr. Panchapakesa Aiyar did not adopt the judgment of Mr. Nainar as his own. He purported merely to be the mouth piece of Mr. Nainar, as is indicated by the use of the following words at the end of the judgment: "Pronounced in open Court on behalf of Mr. Nainar". In *Jogesh Chandra Roy* v. *Surendra Mohan Roy Chowdury* (6) the decision in *Sankara Pillai In Re.* (4) was expressly dissented from, it being held that the Sessions Judge had no jurisdiction to pronounce the judgment of his predecessor. If the decision in *Sankara Pillai, In Re* (4) purports to be an interpretation of section 367 Cr. P. C. without reference to the provisions of section 350 Cr. P. C. which deals with cases before a magistrate, then we would find it difficult, with respect, to accept that intepretation as correct. But it is unnecessary for the purpose of disposing of this appeal to expressly dissent from it, because it can be distinguished on two grounds: the first is that already indicated, i.e., it dealt with a case where there was a change of magistrates in which different considerations arose because of the provisions of Section 350 Cr.P.C., and the second is that in that case the earlier magistrate continued in office when he wrote the judgment, whereas in this case when the judgment of Mr. Nainar was written he was no longer the Sessions Judge of Chittoor.

We may mention in passing an argument of the learned Public Prosecutor based on certain decisions of civil cases that although Mr. Nainar was no longer the Sessions Judge of Chittoor he was still a Sessions Judge possessing certain powers on account of holding that office; but we find no ground for thinking that a Sessions Judge who has ceased to be the Sessions Judge of one division and has not become the Sessions Judge of another has any powers as Sessions Judge *simpliciter*. He has jurisdiction to exercise the powers of a Sessions Judge only by virtue of his appointment to a particular Sessions division.

We therefore hold that Section 367 Cr.P.C. does not authorise a succeeding Judge to pronounce a judgment of his predecessor. We agree with the learned advocates for the ap-

4. (1910) 18 M.L.J. 197
5. (1918) 1 M.W.N. 872 : 40 Mad. 108
6. (1913) 35 C.W.N. 838

pellants that the moment Mr. Nainar handed over to Mr. Panchapakesa Aiyar he became *functus officio* and had no jurisdiction to write a judgment and Mr Panchapakesa Aiyar had no jurisdiction to pronounce a judgment based on evidence recorded by Mr. Nainar. If Mr. Nainar had no jurisdiction to write a judgment and if what purports to be his judgment is not a judgment, then the defect, if it may be so called, cannot be cured by section 537, Cr.P.C. That section says:—

"No finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered . . . . . . on account of any error, omission or irregularity in the . . . judgment . . ,"

If, as we have held, there was no judgment and if what was pronounced by Mr. Panchapakesa Aiyar was merely an expression of the opinion of Mr. Nainar on the evidence that he had heard, then there was no judgment that could be cured, and the order convicting the appellants was entirely without jurisdiction and therefore void. It would follow that the appellants were not lawfully convicted.

Notice has been given to the third and fourth accused, in whose favour an order of acquittal was passed. Since the order purporting to acquit them was not embodied in a valid judgment they were not legally acquitted.

In the result, Sessions case No. 38 of 1945 is remanded to the Sessions Court for disposal after re-hearing. In other words a fresh trial will have to be held by the present Sessions Judge.

N.T.R. — *Re-trial ordered.*

PRIVY COUNCIL

(Appeal from Calcutta High Court)

July 22, 1946

LORD SIMONDS, M. R. JAYAKAR & SIR JOHN BEAUMONT

KUMAR SINGH CHHAJOR and others v. THE KING EMPEROR

Special Criminal Courts Repeal Ordinance (XIX of 1943), Section 3 (1) & (2)—'Sentence passed'—Meaning of—Powers of High Court under.

The word 'sentence' used in relation to the decision of a criminal court may bear a wider or narrower meaning according to the context, but the primary meaning of 'sentence passed' is 'punishment imposed'.

The passing of a sentence in a criminal trial is a distinct step which follows conviction; it is often postponed to a later date and may be based on further evidence relevant to sentence but irrelevant to guilt. Conviction of a criminal offence may have serious consequences, apart from the punishment directly imposed for such offence. It may, for example, disqualify a person from holding office, or may affect his status in society.

The expression 'sentence passed' in Ordinance XIX of 1943 is not used in other than the primary sense. There is nothing in the language of s. 3 (1) to suggest that the Governor-General intended to do more than to render valid the punishment imposed by the special courts, leaving the validity of the convictions to rest on judicial decision.

The subject matter of sub-section (2) is the same as that of sub-section (1) and is confined to punishments imposed. Hence a High Court has power in revision to review the sentences passed, to enhance them or to reduce them but it has no power to set the conviction aside or to direct a retrial.

The High Court possessed no inherent jurisdiction to interfere with the order of a special magistrate under the Special Criminal Courts Ordinance, 1942.

J. M. Pringle, K. C., B. W. Ramsay for Applt.

B. J. M. McKenna for Respt.

JUDGMENT

SIR JOHN BEAUMONT: This is an appeal by special leave from an order of the High Court of Judicature at Fort William in Bengal, made on the 24th August, 1943. By its order the High Court directed that the convictions and sentences passed on the appellants by Mr. S. Chaudury, acting as a special Magistrate under the Special Criminal Courts Ordinance, 1942, be set aside, and that the appellants be retried in the district of Hooghly.

The facts leading up to the appeal can be stated shortly. In January, 1943, the accused were tried on a charge of dacoity under section 395 of the I.P.C. by Mr. Chaudury acting as such special magistrate as aforesaid. On the 19th January, 1943, they were acquitted on the charge under section 395, but were convicted under section 403 of the offence of misappropriation and sentenced to pay a fine of Rs. 50 each. Subsequently, the High Court at Calcutta, of its own motion, called for the record of the case, and on the 24th August, 1943, a bench consisting of the Chief Justice Mr. Justice Khundkar and Mr. Justice Lodge, set aside the convictions and sentences passed upon the appellants

and ordered that they be retried in the district of Hooghly. The ground upon which this order was made was that in the view of the High Court there had been improper interference by the executive authority with the course of justice.

The only question upon which their Lordships have heard an argument is as to whether the High Court had jurisdiction to make the order which it did make, and the grounds upon which the order was based do not call for discussion. Their Lordships would, however, observe that if they were satisfied that the order of the High Court was within its competence they would be very slow to interfere with the manner in which the High Court saw fit to exercise its jurisdiction.

Under the Code of Criminal Procedure, a High Court possesses very wide powers of revision over the proceedings of inferior criminal courts and, in a case tried under the Code, there can be no doubt that a High Court acting under the powers conferred by sections 435 and 439, can send for the record of any proceedings and can set aside a conviction and order a new trial by a court of competent jurisdiction subordinate to such High Court. If this case had been tried under the Code it would have presented no difficulty, but it was, in fact, dealt with under two Ordinances promulgated by the Governor General under section 72 of Schedule IX of the Government of India Act, 1935, and the provisions of those Ordinances must be considered.

Under the Special Criminal Courts Ordinance, 1942 (which is hereinafter referred to aa "the Ordinance of 1942") it is provided in section 3 that courts of criminal jurisdiction may be constituted under the Ordinance consisting of :—

(1) Special Judges;

(2) Special Magistrates, and

(3) Summary Courts.

Section 4 provides that a Provincial Government may appoint to be a special Judge for such area as it may think fit any person who has acted for a period of not less than two years in the exercise of the powers of a Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure. Section 5 deals with the juridiction of Special Judges; section 6 deals with their procedure, and section 7 with the sentences which they may impose. Section 8 enables proceedings before a Special Judge in specified cases to be submitted for review by a person nominated in that behalf by the Provincial Government, which person is to be chosen from the Judges of the appropriate High Court. Section 9 provides that any Presidency Magistrate or Magistrate of the first class, who has exercised powers as such—for a period of not less than two years, may be invested by the Provincial Government with the powers of a Special Magistrate under the Ordinance. Section 10 deals with the jurisdiction of Special Magistrates. Section 11 deals with their procedure, and section 12 with the sentences which they may pass, Section 13 provides that where a Special Magistrate passes a sentence of transportation, or imprisonment for a term exceeding two years, an appeal shall lie to the Special Judge having jurisdiction in the area or, if there is no Special Judge, to the High Court in a Presidency town, and elsewhere to the Court of Session. Subsequent sections deal with Summary Courts and are irrelevant to the present appeal. Section 26 is in the following terms: "Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided in this Ordinance, be no appeal from any order or sentence of a court constituted under this Ordinance, and, save as aforesaid, no court shall have authority to revise such order or sentence, or to transfer any case from any such court, or to make any order under section 491 of the Code or have any jurisdiction of any kind in respect of any proceeding of any such court.

On the 22nd April, 1943 in the case of *The King Emperor* v. *Benori Lal Sarma* (1), the High Court of Calcutta held that the provisions of the Ordinance of 1942 were *ultra vires* and that the Special Courts purporting to act under that Ordinance had no jurisdiction. On the 4th June, 1943, this decision was upheld by the Federal Court of India (2). To complete the history of the case it may be mentioned that on the 6th November, 1944, upon appeal to this Board, the decision of the Federal Court was reversed and it was held that the provisions of the Ordinance of 1942 were *intra vires* and that the Special Courts acting under that Ordinance had jurisdiction (3). This decision, however, was

1. (1943) A.I.R. Cal. 285
2. (1943) M.W.N. 380 : Cr. 76 F.C.
3. (1945) M.W.N. 41 : Cr. 1, P.C.

given after the order of the High Court which is the subject of the present appeal.

On the 5th June, 1943, that is, the day after the delivery of judgment by the Federal Court in *Benaori Lal's case*(2), the Governor General promulgated Ordinance No. XIX of 1943 (which is hereinafter referred to as "the Ordinance of 1943").

Section 1 provides that the Ordinance shall come into force at once. Section 2 repeals the Ordinance of 1942 Section 3 is in the following terms:—"*Confirmation and continuance subject to appeal, of sentences*:—

(1) Any sentence passed by a Special Judge, a Special Magistrate or a Summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code.

(2) Notwithstanding anything contained in any other law, any such sentence as is referred to in sub-section (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under section 8, and whether or not the sentence was the subject of an appeal under section 13 or section 19, of the said Ordinance, be subject to such rights of appeal as would have accrued: and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance,

(3) Where any such sentence as aforesaid has been altered in the course of review or an appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the court which passed the original sentence."

Section 4 deals with pending cases and is not material to the present appeal, and section 5 confers a right of indemnity.

The question as to the jurisdiction of the High Court to make the order under appeal was dealt with very shortly by the High Court in a single sentence contained in the judgment of the learned Chief Justice. He said: "We have our ordinary powers of revision and under the inherent jurisdiction of the court confirmed to us in section 561A of the Criminal Procedure Code we have powers to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice'. If there were any doubt as to our jurisdiction to use those powers, here it is set at rest by sections 3 (2) and 4 of the Ordinance No. XIX of 1943."

In their Lordships' opinion, the suggestion that the High Court possessed inherent jurisdiction to interfere with the order of the Special Magistrate is quite untenable. At the date when the order of the High Court was made the Special Magistrate had been held to have had no jurisdiction. He was not a court inferior to the High Court and indeed was not a court at all, his order was a mere nullity, and no question of revising it could arise. This was pointed out in the opening passage of the judgment of this Board delivered by Lord Simon in *The King Emperor* v. *Benoari Lal Sarma and others* (3). The restoration of the jurisdiction of Special Magistrates by the decision of this Board is irrelevant, since by that time the Ordinance of 1942 had been repealed by the Ordinance of 1943, and, apart from this, clause 26 of the former Ordinance took away all powers of revision by the High Court and no court can claim inherent jurisdiction to exercise powers expressly taken away by legislation. In their Lordships' view, if the High Court possessed any power of revision in the present case, such power must be found in the Ordinance of 1943.

Section 3 of that Ordinance uses the expression "sentence passed" by a Special Judge or Special Magistrate and does not mention "conviction". It has been argued by the Crown that the word "sentence" is used in the Ordinance of 1943 in the wider sense as meaning the judgment or decision of the court; on the other hand, the appellants contended that the word is used in the narrower sense of the pronouncement of the punishment imposed by the court. They rely on certain sections of the Code of Criminal Procedure, e. g., sections 401, 412 and 413 where the word is plainly used in the narrower sense. On the other hand, the Crown relies on sections 405 and 415 where the word is used in a wider sense. Their Lordships do not doubt that the word "sentence" used in relation to the decision of a Criminal Court may bear the wider or narrower meaning

according to the context, but the primary meaning of "sentence passed" the expression used in the ordinance of 1943, is "punishment imposed". The passing of sentence in a criminal trial is a distinct step which follows conviction: it is often postponed to a later date and may be based on further evidence relevant to sentence but irrelevant to guilt. In determining whether the expression is used in the Ordinance of 1943 in other than its primary sense it is necessary to notice the circumstances in which that Ordinance came to be promulgateed. At that time, that is to say, in June, 1943, the Governor-General was faced with the situation that many persons had been convicted by officials duly qualified as Judges and Magistrates experienced in the administration of the Criminal Law, but who had been held by the Federal Court to be without jurisdiction in these particular cases. It may be assumed that the Governor-General would desire to treat the decision of the Federal Court with all respect and that, wide as his powers may be in cases of emergency of legislation by Ordinance under section 72 of Schedule IX of the Government of India Act, 1935, he would be unwilling to promulgate an Ordinance brusquely setting at naught the decision of the Federal Court. On the other hand, as the authority responsible for the safety of India in a very dangerous period, he may well have felt that it would endanger public safety to release all persons who had been convicted and sentenced under the Ordinance. It was in that situation that the Ordinance of 1943 was promulgated; and it is in relation to that situation that it must be construed. Section 2 repealed the Ordinance of 1942 and thereby accepted the result of the decisions of the Federal Court whatever might be the fate of a possible appeal against such decision. Section 3 (1) so far as material for the present purpose provides in effect that any sentence passed by a Special Magistrate under the Ordinance of 1942 shall have effect, and continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure by a magistrate of the first class exercising competent jurisdiction under the said Code. It is very noticeable that it is the sentence passed which is to be treated as having been lawfully passed under the Code, and nothing is said about the conviction recorded. Conviction of a criminal offence may have serious consequences, apart from the punishment directly imposed for such offence. It may, for example, disqualify a person from holding office, or may affect his status in society. It would require clear language to establish that any legislative authority intended to provide that convictions held to have been illegal by the highest judicial tribunal in the country should, neverthless be treated as legal by legislative enactment. Their Lordships can find nothing in the language of section 3(1) of the Ordinance of 1943 to suggest that the Governor General intended to do more than to render valid the punishment, imposed by the special courts, leaving the validity of the convictions to rest on judicial decision. Sub-sec (2) of section 3 mitigates the rigour of sub-section (1) by providing that any sentence referred to in sub sec. (1) shall be subject to such rights of appeal as would have accrued. and to such powers of revision as would have been exercisable under the Code if the sentence at the trial so held had been passed on the date of the commencement of the Ordinance. Sub-sec. (2) seems to be a necessary corollary to sub-sec. (1). Sentences rendered valid by sub-section (1) by treating them as having been lawfully imposed under the Code are to be subject to the same rights in appeal and revision as they would have been subject to if actually so imposed. But it is clear both from the opening reference "to any such sentence as is referred to in sub-sec. (1)" and from its plain intent that the subject-matter of sub-sec. (2) is the same as that of sub-sec (1) and if sub-sec. (1) is confined to punishments imposed, sub-sec (2) is similarly limited. This view of the meaning of the Ordinance of 1943 is in agreement with that taken by a Full Bench of the Bombay High Court in *Kantilal Mangaldas* v. *King Emperor* (4) and in disagreement with the view of a Full Bench of the Chief Court of Sind in *Vishindas Lachmnndas* v. *King Emperor* (5). In their Lordships' opinion the High Court of Calcutta had power in revision to review the sentences passed upon the appellants, to enhance them or to reduce them but it had no power to set the convictions aside or to direct a re trial.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and that the order of the High Court made on the 24th August, 1943, be set aside.

Appeal allowed.

4. (1944) I.L.R. BOM. 142
5. (1944) A.I.R. (31) SIND. 1

Criminal Revision Case No. 35 of 1946
(Criminal Revision Petition No. 34 of 1946)
April 17, 1946
KUPPUSWAMI AYYAR, J.

KALYANA SUNDARA GOUNDER & others v. EMPEROR

Companies Act (VII of 1913), Section 177A—Applicability.

A company was originally dissolved by voluntary liquidation and its name was struck off the register; but under the orders of the court the company was restored and the court directed the winding up after such restoration. Then the Official Liquidator called upon the liquidators in the voluntary winding up under s. 177A to furnish information and on their failure to do so, they were prosecuted.

Held *(1) that on the date on which the proceedings were taken and when the Official Liquidator called for information, the company was being wound up under orders of court and therefore s. 177A applied.*

(2) that the accused were officers of the company and were therefore liable to give the necessary information as required by s. 177A (2) (a).

The words 'subject to the direction of the court' in s. 177A (2) cannot be taken to indicate that such persons who have been the officers of the company can be called upon to submit the statement only if there is a direction by the court to such officers to submit the account.

Petition under sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the judgment of the Court of the Additional First Class Magistrate of Coimbatore dated 3-9-1945 and passed in C.C. No. 606, of 1944.

S. T. Srinivasa Gopalachari for Petr.
Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

This is a petition to revise the Order of the Additional First Class Magistrate of Coimbatore convicting the petitioners under section 177 A (5) of the Indian Companies Act and sentencing the first accused to pay a fine of Rs 50 with one month's simple imprisonment in default, and the second accused to pay a fine of Rs. 25 with two weeks' simple imprisonment in default.

These arise out of proceedings in connection with the winding up of a company known as the Kandaigoundanchavadi Bala Chandra Ganesa Nidhi Ltd. There was a voluntary winding up of the company in 1934. A resolution was passed on 7-1-1934 which was confirmed on 27-1-1934. The first accused who was the Secretary was appointed the liquidator, and the second accused was also appointed as an additional liquidator. There was a third liquidator also whose whereabouts are not known. In 1936, it is stated, both the accused resigned their offices as liquidators. On 13-11-1937, under section 247 (5) of the Indian Companies Act the name of the company was struck off. In 1941, P.W. 3 was appointed as liquidator in the place of accused 1 and 2; and P.W. 3 filed applications against accused 1 and 2 and took steps against them. In 1943 P.W. 3 took proceedings in this Court for getting the order, striking off of the company, set aside, and on 25—11—1943 this Court passed an order restoring the name of the company in the register under section 247 (6), and that the said company after being restored as aforesaid be wound up by the Court under the provisions of the Indian Companies Act, 1913. Then the Official Receiver of Coimbatore had been appointed as the Official Liquidator in respect of this winding up That was on 10th December, 1943. The Official Receiver then called upon these two petitioners under s. 177(A) to furnish information but as they did not furnish the information required they were prosecuted and sentenced, as already stated.

What is urged before me is that this is a case which went into voluntary liquidation and not a case of a company which went into liquidation by order of the Court, and therefore the provisions of s. 177 A of the Act cannot be availed of. To this the short answer is that it is no doubt a company that was originally dissolved by voluntary liquidation and its name was struck off the registers; but under the orders of court the company was restored and the Court directed the winding up after such restoration. Therefore, on the date on which proceedings were taken and when the official liquidator called for information it was in respect of a company which was under liquidation by order of Court and the liquidator who was the person in charge at the time was appointed by the Court which directed the winding up of the proceedings. Thus, there is no force in the contention of the learned counsel for the petitioners that this should be treated as a case of a company wound up by voluntary liquidation and not by order of Court.

The next contention is that if it is considered to be a company wound up by order

of Court, there was no jurisdiction for the Official Receiver to call for information from these accused as he had not obtained directions of the court to so call for information. Reliance is placed upon clause (2) of S. 177-A of the Act. Under Cl. (1) of S. 177-A where the court has made a winding up order, a statement has to be submitted. It is only in the second clause it is stated that the statement shall be submitted and verified by one or more of the persons and in clause (a) of that subsection, it is stated that the statement shall be submitted by person, who are or have been directors or officers of the company. Accused 1 and 2 were official Liquidators of this company. In *Rangai Goundan* v. *Emperor* (1) it has been held by this court that an official Liquidator is an officer of the company. Therefore, they were the persons who ought to give the necessary information as required by S. 177-A (2) (a), and, therefore they are the persons against whom proceedings should be taken if they failed to submit the account. It is true that there are the words 'subject to the direction of the court' in sub-clause (2), but that cannot be taken to indicate that these persons (accused) are liable to submit the accounts only when they had been called upon by the court or the court had directed the liquidator to furnish such a statement. It may be open to the court to ask the Official Liquidator not to call for accounts it they are able to satisfy the court that they are not in a position to submit the accounts; and the liquidator will then act according to the directions that may have to be given by the court. I do not think, therefore, that the words 'subject to the direction of the court' can be taken to indicate that such persons who have been the officers of the court can be called upon to submit the statement only if there is a direction by the court to such officers to submit the account. In this case these two accused are persons against whom there is evidence that they were in possession of the records of the Company and when they were in possession of the records and when information was required from them they were the persons who were bound to give it. I am not, therefore, able to see anything unreasonable in their being called upon to submit an account and it cannot be said that the sentence is excessive.

The petition is dismissed.

N.T.R. — *Petition dismissed.*

1. (1942) M.W.N. 133 : Cr. 101

On Reference
(Letter D. No. 2527 dated 9-3-1946 from the Sessions Judge of Tinnevelly)
April 8, 1946
HORWILL & SHAHAB-UD-DIN, JJ.

Cr. P. C (V of 1898), S. 240—Mixed charge—Withdrawal of one—Criminal Rules of Practice, R. 156.

A Sessions Judge, confronted with a mixed charge of murder and an offence against property, should either take the charge framed by the committing magistrate and adopt it, or if he wishes to change the charge in any way, he should include in the modified charge all the various heads found in the charge of the committing magistrate; so that it can be seen at a glance that the terms of section 240 Cr. P.C. would apply.

In any case, it is desirable even in the interests of the accused, that the Sessions Judge should not permit the withdrawal of the other charge by the Public Prosecutor until the appeal time has expired and if an appeal has been filed, the appeal has been disposed of.

Letter of Reference from the Sessions Judge of the Tinnevelly Division-D. No. 2527 dated the 9th day of March 1946 in S. C. No. 13 of 1946 on his file requesting elucidation of the practice to be adopted in cases where the charges against the same accused are separated for trial and when the accused is convicted on any one of the charges and when the Public Prosecutor applies under Section 240 Criminal Procedure Code for the withdrawal of the remaining charge or charges.

Public Prosecutor, for Crown.

ORDER

Three persons were charged by the Committing Magistrate both with murder and with theft in a building. When the matter came before the Sessions Court, the Sessions Judge purported to act upon the suggestion contained in Rule 156 of the Crimiaal Rules of Practice, separated the charges under Ss. 302 and 380 of the I. P. C. and proceeded only with the trial under s. 302. He convicted the first and third accused and acquitted the second accused. The two convicted accused appealed to this Court but before the appeal was heard, the Public Prosecutor withdrew the charge under s. 380 against the appellants and they were acquitted. In appeal, this Court held that it had not been proved that the third accused was guilty of murder. In its judgment, however, it indicated that it would have convicted the third accused under S. 411 of the I. P. C. had it not been for the circumstance that she had already been acquitted of the charge under s. 380 I P.C. The learned Judge has point-

ed out in the reference under consideration that the judgment of this Court contains no reference to s. 240 of the Code of Criminal Procedure and has asked for instructions as to what he should do in future cases of a similar nature.

A charge must be framed by the committing Magistrate under s. 210 of the Code of Criminal Procedure against a person committed by him to Sessions. The Code of Criminal Procedure makes no provision for the framing of a fresh charge by the Sessions Court; but s. 226 of the Code of Criminal Procedure enables the Sessions Court to add to or alter the charge, or to frame one if the magistrate omits to do so. It would therefore seem that the charge against the accused in the Sessions Court is the charges as framed by the committing Magistrate subject to such addition or alteration as the Sessions Judge may make. Since a charge has already been framed before a case comes before the Sessions Court, any withdrawal of a charge against an accused would operate as an acquittal and would bar a re-trial of the accused on that charge unless s. 240 operated.

In his modified charge, the learned Sessions Judge did not include the charge under s. 380 of the Indian Penal Code and so, unless the charge of the Committing Magistrate can be read together with the charge read out to the accused in the Sessions, Court, the withdrawal of the charge would result in an acquittal that would bar a re-trial; for s 240 only applies to charges containing more heads than one framed against the same person. It is perhaps possible to regard the charge in the Sessions Court as the charge framed by the committing Magistrate subject to the alterations made in the charge charge under S. 226. If so then S. 240 would apply and the third accused could have been re-tried. There is, however, some doubt whether S. 240 would apply; because of the omission of the learned Judge to include the charge under S 380 I.P.C. in his revised charge. We therefore consider that the Sessions Judge, confronted with a mixed charge of murder and an offence against property, should either take the charge framed by the committing Magistrate and adopt it or, if he wishes to change the charge in any way, he should include in the modified charge all the various heads found in the charge of the committing Magistrate; so that it can be seen at a glance that the terms of S. 240 would apply.

In any case, we consider it desirable—even in the interests of the accused—that the Sessions Judge should not permit the withdrawal of the other charge by the Public Prosecutor until the appeal time has expired and, if an appeal has been filed, the appeal has been disposed of.

N.T.R.

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PRIVY COUNCIL

(Appeal from the Lahore High Court)

June 18, 1946

LORD SIMONDS, M. R. JAYAKAR & SIR JOHN BEAUMONT

NATHA SINGH & another

v.

THE KING-EMPEROR

Evidence Act (I of 1872), Section 8—Evidence of commission of another crime, to prove motive—Admissibility.

However improbable an alleged motive may be, the prosecution is entitled to call evidence in support of it, and none the less so because such evidence may suggest that the accused has committed some crime other than that with which he is charged. If such evidence is given with a view to showing that they were persons likely to have committed the offence with which they have been charged, the evidence would be inadmissible; but it is admissible to establish motive for the offence with which they were charged.

A.G.P. Pullan & J.M.R. Jayakar, for Applt.

J. Megaw, for Respt.

JUDGMENT

Sir John Beaumont: This is an appeal from two judgments and orders of the High Court of Judicature at Lahore dated 7th June 1945, which dismissed the appeals of the appellants, and confirmed the sentences of death passed on them, by the judgment, and order, dated the 9th February, 1945, of the Sessions Judge, Amritsar. Their Lordships have already announced that they will humbly advise His Majesty that the appeal be dismissed and they now give their reasons.

The ground upon which special leave to appeal was granted was the allegation that evidence that the appellants had committed a murder other than that with which they were charged was wrongly admitted, and this has been the principal point argued on their behalf.

The appellants were tried and convicted on a charge of having murdered one Karnail Singh on the 19th September, 1944. There were four alleged eye-witnesses of the murder, namely, the approver Qadir, who said that he had been with the appellants, Surain Singh, an uncle. Mt. Gurmej Kaur the wife,

and Jita, a servant, of the murdered man, Karnail Singh had a brother, Bhan Singh, whose wife was said to have been in illicit intimacy with the appellant Natha Singh, and Karnail Singh is said to have objected to this intimacy There seems no reason to doubt the existence of this intimacy, nor that it had occasioned ill-will between Karnail Singh and his brother on the one hand and Natha Singh on the other. The other appellant, Budha Singh, was a friend of Natha Singh.

On the 1st October, 1944 after the appellants had been arrested for the murder of Karnail Singh, a body without a head was found, and this was said to be the body of Bhan Singh. On the information of the approver, Qadir, the appellants were also charged with the murder of Bhan Singh. This charge was tried with different assessors immediately after the conclusion of the trial of the appellants for the murder of Karnail Singh, but before judgment in the latter trial had been delivered. Judgment In both cases was delivered on the same day. The appellants were acquitted of the murder of Bhan Singh, mainly on the ground that there was no corroboration of the evidence of the approver and that there was no clear evidence of the identity of the body. They were convicted of the murder of Karnail Singh.

At the trial of the appellants for the murder of Karnail Singh the approver gave evidence that he and the appellants had murdered Bhan Singh a few days before the murder of Karnail Singh, and that they proposed to conceal the murder of Bhan Singh by causing injuries to Karnail Singh and getting themselves arrested for so doing. That is to say, the evidence of the approver was that the motive, or at any rate one of the motives, for the injuries caused to Karnail Singh was a desire to conceal the murder of Bhan Singh, The suggested motive is no doubt a singular one, but however improbable an alleged motive may be the prosecution is entitled to call evidence in support of it, and none the less so because such evidence may suggest that the accused has committed some crime other than that with which he is charged (see illustration (a) to S. 8 of the Evidence Act). If evidence that the appellants had murdered Bhan Singh had been given with a view to showing that they were persons likely to have committed the murder of Karnail Singh, the evidence would have been inadmisssble; but it was admissible to establish motive for the murder with which they were charged. It would have been better if the learned Sessions Judge had pointed out to the assessors the limited purpose for which evidence of the murder of Bhan Singh could be used, but in trials with the aid of assessors the decision rests with the judge, and not with the assessors, and when the Sessions Judge convicted the appellants of the murder of Karnail Singh, he knew that they had been, or were about to be, acquitted of the murder of Bhan Singh, and that the evidence as to the latter murder was of no consequence. In their Lordships' opinion the evidence objected to was properly admitted.

The only other point seriously argued on behalf of the appellants was that the evidence of the eye witnesses should have been disbelieved since it was in conflict with the medical evidence. The story of the uncle, wife, and servant of Karnail Singh was that they saw the assault, rushed to the place as the assailants fled, and found Karnail already dead. The civil surgeon of Amritsar gave evidence in the court of the committing magistrate and his evidence was brought on the record of the sessions court under section 509 (1) of the Code of Criminal Procedure. After detailing the injuries which he found on the dead body of Karnail he stated that the death occurred a few hours after receipt of injuries. This opinion no doubt conflicts with the story of the eye-witnesses, but it was open to the High Court, as well as to the Sessions Judge, to believe the witnesses in spite of the opinion of the doctor and they clearly did so. Moreover their Lordships observe that no reliance seems to have been placed in the courts in India on a conflict between the evidence of the eye-witnesses and of the doctor. The matter is not discussed in the judgments either in the Sessions Court or the High Court, nor was it included in the grounds of appeal to the High Court. Had any emphasis been placed on the opinion of the civil surgeon, it would have been open to the Sessions Judge under the powers contained in section 509 (2) or to the High Court under the powers contained in section 429 to have summoned him as a witness, when the reasons for his opinion could have been investigated. It is too late to take the point now.

—— *Appeal dismissed*

Criminal Revision Case No. 6 of 1946.
(Case Referred No. 1 of 1946.)
February 21, 1946,
KUPPUSWAMI AYYAR, J.

CHUCKLER SEVUTTU RAMAN
v.
EMPEROR

Cr P.C. (V of 1898), S. 341—Applicability.

Where according to the medical evidence the accused person was only slightly deaf *and he could hear when talked to at a close range, an order under S. 341 Cr.P.C. cannot be made.*

Case referred for the Orders of the High Court under section 341 of the Criminal Procedure Code, by the District Magistrate of North Arcot in his letter, dated 3—1—1946.

Public Prosecutor for Crown.

Counsel not appearing on behalf of the Accused.

ORDER

This is not a case in which the medical evidence indicates that it is not possible to make the accused know what the proceedings are. Of course somebody will have to take the trouble to speak to the accused in close range and explain him what all has taken place in Court as and when the proceedings go on. It is no doubt a difficult job, but then that will have to be done because the person is deaf. It cannot therefore be said that it is a case in which it is not possible to the Magistrate to make the accused understand what is going on in Court. Merely because the Magistrate will have to take some trouble in making the accused know what is going on, I will not be justified in passing any orders dispensing with the taking of any efforts to make the accused know what is going on. The medical evidence, according to the letter of reference is that the accused person is only *slightly deaf* and there is evidence of one of the witnesses for prosecution who knew him for fifteen years that though he is deaf, he could hear when talked to at a close range. The papers are returned to the Magistrate to proceed with the case in the light of the observations made above.

N.T.R.

Criminal Revision Case No. 404 of 1946.
(Case Referred No 14 of 1946.)
August 8, 1946.
HAPPELL, J.

VENKADARI THIPPAYYA & others.
v.
EMPEROR

Criminal trial—Magistrate witness—If can try case.

A magistrate should not try a case in which he himself had given evidence even with the consent of the accused. The consent of the accused cannot validate a trial that is manifestly improper.

Case referred for Orders of the High Court, under S. 438, of the Criminal Proceedure Code by the Sessions Judge of Kurnool in his letter dated 2—4—1946.

A. Bhujanga Rao, for Accused

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

In C C. No. 127 of 1945 in the Court of the Additional First Class Magistrate of Kurnool one Vandari Changalrayudu was charged with an offence in contravention of the Defence of India Rules. The case was taken up for trial and the Tahsildar of Nandyal, Mr. K. M. Ahmed Sahib Bahadur, gave evidence as P. W. 4. After he had given evidence but before the case was closed Mr. Ahmed was appointed Additional First Class Magistrate of Kurnool to succeed the Magistrate who was trying C.C. No 127 of 1945. He proceeded with the trial of the case and convicted the accused. The accused appealed to the Sessions Judge of Kurnool and the learned Sessions Judge set aside the conviction on the ground that Mr Ahmed should not have heard the case after he had himself given evidence in it, and directed that it should be re-heard by any other competent magistrate. Subsequent to the passing of this judgment in appeal, the learned Sessions Judge learnt that Mr. Ahmed had taken up and continued the trial of C.C. No. 127 of 19 5 with the consent of the accused. The learned Sessions Judge has now made this reference and asks that, in the circumstances, his order of remand should be set aside and the appeal be restored to the file of his Court, for disposal on merits.

In my judgment the reference cannot be accepted. Mr. Ahmed should never have tried the case in view of the fact that he had himself given evidence in it. The impropriety of passing judgment in a case in which he had himself given evidence should have been obvious to him. The consent of the accused cannot validate a trial that was so maifestly improper. The reference is therefore rejected. The order passed on appeal by the learned Sessions judge, in my opinion, was the proper order even if the fact of the consent of the accused had been known to him when he passed judgment, and it will stand.

N.T.R.

Criminal Revision Case No. 111 of 1946.
(Criminal Revision Petition No. 108 of 1946)
August 8, 1946.
HAPPELL, J.

PAPIREDDIGARI GOPALA REDDI & Another
v.
N. LAKSHMI REDDI

Penal Code (XLV of 1860), *S.* 341 – *Offence under.*

Voluntary obstruction of a vehicle in which persons are travelling would amount to the offence of wrongful restraint of the person in the vehicle. The fact that the person or persons may get down and then be left at liberty to proceed on their way unmolested is immaterial. If the person is prevented from proceeding at the moment of restraint, the terms of S. 341 *I. P. C are satisfied.*

Observation in I. L. R. 1942 *Mad,* 696 *at page* 716 *held* obiter *and* not followed.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the court of the Sub Divisional Magistrate of Gooty in Criminal Appeal No. 52 of 1945 (C. C. No. 596 of 1945 on the file of the court of the Stationary Sub Magistrate of Tadpatri).

V. C. Gopalaratnam, for Petrs.

Public Prosecutor (V. L. Ethiraj), for Crown.

Respondent not represented.

ORDER

The question in this Criminal Revision Case is whether the petitioners were rightly convicted of offences under Section 341 of the Penal Code. The facts as found are these. The petitioners apparently objected to P. W. 1 driving a cart along a path which passed in front of their house. On the day on which the offence is said to have been committed, P. W. 1 was seen by the accused to pass at about 11 a. m. and then when he returned at about 12-30 p. m. they stopped the cart and unyoked the bulls. P. W. 1 who was sitting on the shaft fell down when the bulls were unyoked. The bulls ran away and P. W. 1 proceeded on his way on foot. Accepting the evidence the learned Magistrate convicted the accused of offences under section 341 I. P. C. and sentenced them each to pay a fine of Rs. 50.

The arguments advanced by Mr. V. C. Gopalaratnam for the petitioners is that there was no wrongful restraint within the meaning of section 339 I.P.C., because although the cart was stopped, P. W. 1 was left free to proceed on his way on foot. The restraint, in short, it is argued, was of the vehicle and not of the person as required by section 339 I. P. C. The argument no doubt receives support from decisions of the Bombay and Calcutta High Courts (vide *Emperor* v. *Rama Lala* [1] and *Durga Pada Chatterjee* v *Nilamani Ghose* [2]). These decisions, however, have not been followed in a series of decisions by single Judges of this Court, (vide *In re Feria Ponnuswamy Goundan* [3], *Muhammad Yusuf Sahib In re* [4] and *Muthu Padayachi* v. *Emperor* [5]). In the case first cited Jackson J. stated in his order :

> "It is argued that restraining a horse on which a person is riding is not wrongful restraint as defined by section 339 I. P. C. If the person is prevented from proceeding at the moment of restraint the terms of the section are satisfied. It is no defence that he might have got off the horse, and walked in the same direction."

It is contended that there are other Madras decisions which are opposed to the three decisions cited and that in particular these three decisions must be taken to have been overruled by a decision of a Bench of this Court in *Maharani of Nabha* v *Province of Madras* [6]. I will deal with the Bench case in a moment. The other two decisions cited do not seem to me to be in conflict with the three decisions of single Judges to which reference has already been made. They are *Kumbala Guruvadu* v. *Krishna Reddy* [7] and *Criminal Revision Case No. 125 of 1899* [8]. It does not seem to me that in *Kumbala Guruvadu* v. *Krishna Reddy* [7] Oldfield J. has adopted the view taken in the Calcutta High Court that to stop a cart with a man in it is restraint of the vehicle and not of the person. It appears from his judgment that it was not clear from the evidence where the cart was being driven or whether there were any people in it. *Criminal Revision Case No.* 125 *of* 1899 (8) was not a case of a cart being stopped by a person but the case of an obstruction put across a path which prevented carts in general from proceeding along that path although it did not prevent persons from stepping over it. In *Maharani of Nabha* v *The Province of Madras* (6) no doubt an observation is to be found at page 716 of the judgment from which it appears that the learned Judges would have taken the view that the stoppage of a

1. (1912) 15 Bom L. R. 103
2. (1935) A.I.R. Cal. 252
3. (1927) A.I.R. Mad. 506
4. (1938) M W N. 1010: Cr. 183
5. (1934) M.W.N. 620: Cr. 124
6. (1942) M.W.N. 602: Cr. 146: I.L.R. 1942 Mad. 696
7. (1915) M W N. 203
8. Weir's Criminal Ruling Vol. I P. 340(341

cart would not amount to the offence of wrongful restraint if the person in the cart was not restrained himself but was left at liberty to go on his way without the cart. The question, however, did not arise for decision in the case in this form as in so far as the question of wrongful restraint arose at all it was admitted that the offence had been committed. The observation was obiter and was made in the course of the discussion of the question whether the Maharani of Nabha had been wrongfully confined and not of the question whether she had been wrongfully restrained. I do not think therefore I am bound to differ from what is the general course of decisions of this Court by anything that has been said in *Maharani of Nabha* v. *The Province of Madras* (1). With respect to the learned Judge who decided *Durga Pada Chatterjee* v. *Nilamani Ghose* (2) referred to above, I am unable to see why the voluntary obstruction of a vehicle in which persons were travelling should not amount to the wrongful restraint of the persons in the vehicle. The fact that the person or persons may get down and then be left at liberty to proceed on their way unmolested seems to me immaterial. I agree with the observation of Jackson J. that if the person is prevented from proceeding at the moment of restraint the terms of the section are satisfied. In that view the petitioners were rightly convicted, and I see no sufficient reason to interfere with the sentence passed.

The petition is therefore dismissed.

N.T.R. —— *Petition dismissed*

Criminal Revision Case No. 1109 of 1945
(Criminal Revision Petition No. 1025 of 1946)

August 2, 1946

YAHYA ALI, J.

RAMASWAMI NAICKER
v.
RANGASWAMI NAICKER & another

Criminal Procedure Code (V of 1898*), Ss. 259 &* 350 – *Warrant case—Complainant absent—Discharge of accused.*

In a warrrant case after a charge has been framed a court to whom the case was transferred after the framing of the charge cannot discharge the accused person when the complainant is absent.

The grant of a de novo *trial under the provisions of S.* 350, *Cr. P. C. has not the effect of wiping out the charge already framed against the accused.*

I. L. R. 38 *Mad.* 585, followed.

47 M.L.J. 926 & 57 Mad. 1019, not followed.

A wrong order of discharge in such circumstances can be set aside by the High Court in revision even if it amounts to an order of acquittal.

Petiton under Section 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Court of Sub Magistrate of Virudhunagar dated 18—9—1945 and passed in C.C. No. 409 of 1945.

K. P. Raman Menon, for Compalinant.
K. Veeraswami, for Accused.
Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER. (22—7—46)

This case was first tried by the Sub-Magistrate of Sattur, who after examining the witnesses for the prosecution framed a charge against accused 1 and 2 under sections 324 and 323 I. P. C. respectively on the 3rd May 1945. Subsequently the Sub-Divisional Magistrate of Sivakasi transferred the case to the file of the Sub-Magistrate of Virudhunagar. The case was taken on file on the 20th June 1945 and summons issued to the accused and notice to the complainant. On 27-7-45 the accused applied to the Magistrate for a *de novo* trial and the application was granted and all the P. Ws. were resummoned and reheard. The case stood posted on the 18th September, 1945, for the examination of the medical witness who was the only remaining prosecution witness. On that day the complainant was absent when called. The Sub-Magistrate of Virudunagar discharged the accused and passed the following order:—

"The complainant not appearing this day, the date fixed for the hearing of the case and it appearing that the alleged offence is one which may be lawfully compounded, the Court directs under section 259 Criminal Procedure Code, that the accused be discharged."

This application is to revise the abovementioned order of discharge passed by the Sub-Magistrate of Virudunagar.

The question for decision is whether in a warrant case after a charge has been framed, a court to whom the case was transferred after the framing of the charge can discharge an accused person when the complainant is not present. The contention of the respondent is that since there has been a *de novo* trial granted in this case by the Sub-Magistrate of Virudunagar the charge framed by the Sub-Magistrate of Sattur should be deemed to have been wiped out altogether by reason of S. 350 of the Criminal Procedure Code and that so long as there is no charge subsisting it is open to the court under S. 259 Cr. P. C.

to discharge the accused if the complainant is absent. The view propounded by the respondent's advocate that the charge should be deemed to have been wiped out when a *de novo* trial is granted cannot be upheld. A Bench of this court held in *Sriramulu* v. *Veerasalingam* [1] on similar facts that where a Magistrate framed charges against an accused person and was succeeded by another Magistrate who recommenced the case under S. 350, Criminal Procedure Code the succeeding Magistrate cannot ignore the charge framed by his predecessor and his position is practically the same as that of his predecessor would have been if, after framing a charge he had heard further cross-examination of the P. Ws. under S. 256 (1) and on a consideration thereof became satisfied that the charge was not well founded. The reason of the rule was set out thus in the judgment of Ayling J:—

"The only object of the substantive portion of clause (1) of section 350 seems to be to leave it to the discretion of the Magistrate to either act on evidence recorded by his predecessor or to hear it over again for himself. The discretion is somewhat restricted by proviso (a) and proviso (b) gives the superior courts special powers of interference. Subject to these provisos the discretion is absolute. It is not clear why this should involve the cancellation of the charge or the transformation of the proceedings from a "trial" back into an enquiry."

This decision was followed in *In re Ramanna* [2] by Curgenven J. who held that in such circumstances it is not open to the second Magistrate to ignore the charge and he must proceed with the case on the footing that the charge has already been framed. The learned Judge pointed out:

"It is sometimes loosely described as a right to *de novo* trial, but all that the provision allows is that he may demand that the witnesses or any of them be resummoned and re heard. When a charge has already been framed, this, as Ayling, J. remarks, makes the Magistrate's position practically the same as that of his predecessor would have been if, after framing a charge he had heard further cross examination of the prosecution witnesses under section 256 (1). It follows that if the second Magistrate is not to frame a fresh charge but to act upon the charge already framed, no occasion can arise for any cross-examination after the framing of the charge and in fact the reasons for allowing such further cross-examination, cannot in the circumstances exist."

In an unreported judgment in *Abdul Hameed Rowther and others* v. *Muhammad Sali Rowther* (Criminal Revision Case No. 498 of 1938—Criminal Revision Petition No. 463 of 1939) Lakshmana Rao J. has followed the decision in *Sriramulu* v. *Veerasalingam* [1].

The learned advocate for the respondent has drawn my attention to two other cases in *Sardar Khan Sahib* v. *Athanlla* (3) and *Ramalingam Pillai, In re* (4) in neither of these two cases which were decisions of single judges was the Bench decision in 38 Madras referred to and although it is held that on the granting of *de novo* trial prior proceedings are wiped out, there is no reference to the question that is at issue here whether the resummoning and rehearing of witnesses under proviso (a) to section 350 (1) Cr. P. C. at the instance of the accused has the effect of wiping out the charge already framed against the accused. In this state of the decisions, I feel bound to give effect to the principle involved in the Bench decision.

The result is that in a warrant case where a charge has been framed the Magistrate is not competent in the absence of the complainant to pass an order of discharge under section 259 Cr. P. C. ignoring the charge already framed. The order of discharge passed in this case, being contrary to law, has to be set aside.

ORDER

It has to be noticed that in *Sriramulu* v. *Veerasalingam* (1) an order of discharge passed after the charge had been framed was viewed as an order of acquittal. With regard to this aspect of the case, I have heard the parties once again as also the learned Public Prosecutor. There can be no question that this Court has the power in a proceeding of this kind to set aside the order even if it amounts to an order of acquittal. For the reasons that I have given in setting aside the order as one of discharge, I find that the order even viewed as one of acquittal cannot be upheld and it is therefore set aside.

The petition is allowed. The case will be restored to file and the Magistrate is directed to re-hear it.

N.T.R. —— *Petitions allowed*

Criminal Revision Case No. 85 of 1946
(Criminal Revision Petition No. 82 of 1946)

August 15, 1946

YAHYA ALI, J.

PENTAKOTA LATCHANNA & another
v.
VUGGINNA KANNAYAMMA

Cr. P. C. (V of 1898), Ss. 244 & 245—Summons case—Continuation as a warrant case.

1. [1914] M.W.N. 646: I.L.R. 38 Mad. 585
2. [1933] M.W.N. 94: Cr. 6
3. (1924) 47 M.L.J. 926
4. (1934) M.W.N. 369: Cr. 57: 57 Mad. 1019

Where a magistrate begins a trial for offences under Ss. 436 and 352 I. P.C. under the summons case procedure and then finds that the evidence discloses offences under Ss. 379 and 352 triable under the warrant case procedure, the magistrate is not bound to acquit the accused, but can register the case under S. 379 I.P.C. and proceed with the trial under the warrant case procedure

(1936) *M. W. N.* 181: *Cr.* 29, not followed.
(1938) *M. W. N.* 589; *Cr.* 109, followed.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the court of the Joint Magistrate of Narasapatam dated 29—10—1945 in Criminal Appeal No. 43 of 1945 (C.C. No. 549 of 1945, Stationary sub Magistrate, Narasapatam).

E. Venkatesam for Petrs.

Public Prosecutor (*V. L. Ethiraj*) for the Crown

Respondent not represented.

ORDER

The petitioners were first indicted under Ss. 436 and 352 of the Indian Penal Code and the summons procedure was followed upto a certain stage. Subsequently the trying Magistrate felt that the evidence disclosed offences under Ss 379 and 352 of the Code and decided to adopt the warrant case procedure. It is admitted that thereafter the provisions of Chapter XXI were duly followed and ultimately the petitioners were convicted under Ss. 379 and 352 of the Code Objection was taken to this course and it was pointed out that under Ss. 244 and 245 of the Code of Criminal Procedure the Magistrate was bound, at the stage when he attempted to convert the summons case into a warrant case when he found that no case had been made out under S. 426 Indian Penal Code, to acquit the accused and he was not entitled to register a case under Section 379 and proceed under Chapter XXI. With regard to this contention at one time it found acceptance in this Court In *Rajaratnam Pillai in re* (1) King, J. said this:

"Triable under this chapter' means, of course, any offence triable under the procedure laid down for the trial of summons cases, and although Section 246 does not contain any explicit prohibition of the procedure now complained against, it is quite obvious that such prohibition is implied in it and that, once a Magistrate has taken cognizance of a summons case, he cannot convict an accused person for anything but an offence triable as a summons case."

This view was dissented from by Burn, J. in *Venkataramanier* v. *Varadarajulu Chetti* (2) Referring to the decision cited above, the learned Judge observed:

"With all respect to King J. I am unable to follow the reasoning in *Rajaratnam Pillai* v. *Emperor* (1) ..... If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is, I think bound to apply warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial."

The question came up later before King, J. in *Malai* v. *Emperor* (3), and he reconsidered the opinion expressed by him in *Rajaratnam Pillai in re* (1), and stated that the position had been set out in that case with some lack of precision. He did not adhere to the view that once a Magistrate has taken cognizance of an offence which is triable only according to the procedure applicable to summons case he must stick to that procedure. The learned advocate for the petitioners tried to show that the facts of the case before Burn J. and the later case before King J. were slightly different from the present case but I see no difference in principle. This contention must, therefore, be negatived.

On the merits, there is hardly anything to consider. The learned Joint Magistrate has found that the removal of the crop was not with a view to establish a right or supposed right and the trial Court has found that the removal was done with a dishonest intention. An offence under Section 352, I.P.C. has also been made out.

I see no reason to interfere with the conviction of the petitioners The sentences are not unreasonable. The petition is dismissed.

N.T.R. —— *Petition dismissed*

1. (1936) M.W.N. 181; Cr. 29: 59 Mad. 442
2. (1938) M.W.N. 589; Cr. 109; I.L.R. Mad. 814
3. (1937) M.W.N. 981; Cr. 197; I.L.R. 1938 Mad. 343

Criminal Appeal No. 268 of 1946
September 3, 1946.

YAHYA ALI J.

THE PUBLIC PROSECUTOR
v.
MODI KONDAYYA

Prevention of Adulteration Act (Madras Act III of 1918) S. 5 (1) (d) R. 29A—Sale of adulterated hot milk—Offence.

Hot milk is nothing but milk in its natural condition which has been made hot and it should contain the prescribed minima of milk fat and milk solids. A person selling hot milk adulterated by the addition of water is punishable under R. 29 of the Rules under the Prevention of Adulteration Act.

The test of liability under the Act is not the purpose for which the adulteration was effect-

ed or the intention to commit fraud. Therefore it is not necessary to prove that the intention was to increase the bulk or measure or to debase the quality or that the intention was of a fraudulent nature.

Appeal under Section 417 of the Code of Criminal Procedure 1898, against the acquittal of the aforesaid Respondent (Accused) by the stationary Sub Magistrate of Narasapur in C.C, No 1703 of 1945 on his file.

Assistant Public Prosecutor (*A. S. Sivakaminathan*) for Applt.

B T. Sundararajan, amicus curiae.

JUDGMENT.

This is an appeal by the Public Prosecutor against the acquittal of the respondent by the Stationary Sub Magistrate of Narasapur of the alleged offence of adulterating milk, an offence punishable under rule 29 of the rules framed under the Madras Prevention of Adulteration Act, 1918 (hereinafter called the Act). As the respondent was not represented and the matter was of some public importance, Mr. B T. Sundararajan was appointed *amicus curiae* and I am obliged to him for the valuable assistance rendered by him.

The case brought by the Municipality of Palacole against the respondent who is a milk vendor, was that he was in possession, for the purpose of sale, of buffalo's milk which had been adulterated by the addition of 13 per cent of water. A sample of the milk was obtained by the Sanitary Inspector, P.W. 1 who, after complying with the prescribed formalities, sent it to the Government Analyst who in his certificate. Ex. F, gave the opinion that the sample sent to him contained milk which had been deprived of fat to the extent of atleast 61 per cent and that the proportion of the milk was not more than 87 per cent while the added water was at least 13 per cent. He also stated in his opinion that the sample contained only 1·5 per cent of milk fat and 7 8 per cent of milk solids other than milk fat, as against the prescribed percentage of 4·5 per cent of milk fat and 9 per cent of milk-solids. The accused merely denied the offence although at a later stage he also pleaded that the milk belonged to Venga Ramamurthi under whose orders he was delivering it to P.W. 3's coffee hotel That plea was rightly rejected by the Magistrate. The Magistrate found it established in the evidence that the milk, which was supplied to P. W. 3 by the Respondent and whose sample was taken by the Sanitary Inspector P.W. 1, was boiled milk and not raw milk He was of the view that before and during boiling it was necessary to add water to prevent the milk boiling over and that therefore the adulteration in this case of 13 per cent of water was not "to increase the bulk or measure or to debase the quality of milk." He found that the accused could not be "classed with milk vendors who sell raw milk fraudulently added with water to increase its measure" and in that view, he acquitted the accused.

It must at the outset be pointed out that the Magistrate was not justified in introducing as a test of liability the purpose for which adulteration was effected and further of importing into it the element of an intention to commit fraud The material provisions do not postulate that for establishing the offence of adulteration it is either necessary to prove that the intention was to increase bulk or measure or to debase the quality or that that the intention was of a fraudulent nature In another place in his judgment, the learned Magistrate seems to express the view that since in this case it is not raw milk but hot milk that was being sold, the provisions of the Act did not apply. It is against this view of the Magistrate that the present appeal is essentially directed.

Milk is defined in section 2 of the Act as meaning the "normal clean secretion drawn from the udder of a healthy cow or buffalo either completely, or, after the first portion of such secretion has been drawn off, to completion." Under section 5 (1) (d) it is provided that every person who offers for sale or sells milk which is not up to the standard of purity prescribed by the Local Government shall be punished for the first offence with fine which may extend to one hundred rupees and for every subsequent offence with fine which may extend to five hundred rupees. Under S. 20 (2) the powers of making rules under the Act has been given to the local Government for the following among other purposes:

(1) prohibiting or regulating in the interests of public health;

(i) the addition of water or other dilutant or adulterant to any food;

(ii) the abstraction of any ingredient from any food; and

(iii) the sale of any food to which such addition or from which such abstraction has been made or which has been otherwise artificially treated".

In the rules framed under the Act, the following rules are material to the issue in this case.

RULE 27; "No person shall add any water, or any skimmed or seperated milk to milk intended for sale and no person shall either by himself or by any ser-

vant or agent sell or offer or expose for sale, and no person shall have in his possession for the purpose of sale any milk to which any such addition has been made".

Rule 29: "Whoever commits a breach of any of the rules in this part shall be punishable.

(a) in the case of a first conviction with fine which may extend to one hundred rupees; and

(b) in the case of a subsequent conviction, with fine which may extend to five hundred rupees."

With regard to the standard of purity referred to in section 5 (1) (d) of the Act, the rules relating to the standard prescribed for buffalo's milk are rules 19 and 20 which are in these terms:—

Rule 19: Where a sample of buffalo's milk (not being sold or offered for sale as skimmed or separated milk) contains less than 4. 5 per cent of milk-fat, it shall be presumed for the purpose of the Act, until the contrary is proved that the milk is not genuine by reason of the abstraction therefrom of milk-fat, or the addition thereto of water."

Rule 20; "Where a sample of buffalo's milk whether sold, or offered for sale as buffalo's milk or as skimmed or separated buffalo's milk, contains less than 9 per cent of milk solids other than milk-fat it shall be presumed for the purposes of the Act, until the contrary is proved that the milk is not genuine by reason of the addition thereto of water."

I have already mentioned with reference to Ex. F, the Government Analyst's certificate, that as against 4·5 per cent of milk-fat and 9 per cent of milk solids prescribed under the foregoing rules, the percentage in the case of milk taken from the respondent was 1·5 per cent of milk-fat and 7·8 per cent of milk-solids. There can be no question therefore that the milk sold by the respondent was not of the nature, substance and quality prescribed under the rules and was not up to the standard of purity prescribed by the Local Government.

The distinction sought to be drawn however was on the basis that the respondent did not pretend to sell milk in the same state as it came from the buffalo: but he sold it as hot milk to which it was essential to add some water and in this connection attention was drawn to the evidence of P.W. 3 himself who stated that he was aware that it was boiled milk, that it was milk with water added and that with that knowledge he purchased the milk. The knowledge and awareness of P W. 3 are wholly immaterial as the object and policy of the statute is to protect the public by prohibiting the sale in any circumstances of adulterated milk or milk which did not come up to the prescribed standard of purity. The only question then is whether it ceases to be milk within the meaning of the Act when it is sold as hot milk. *Prima facie* it does not, having regard to the definition of milk in the Act. The Act itself makes no distinction between raw and hot milk and provides no exception in the case of hot milk. To recognise aud give effect to any such exception on *a priori* grounds would be contrary to the spirit and intendment of the Act and the rules and would enable a milk vendor to adulterate milk to any extent he pleases and escape liability altogether by merely applying some heat to the milk.

Although there is a mass of English decisions under the Sale of Food and Drugs Acts concerning the several varieties of milk—new sweet, skimmed, separated, dried, condensed etc—(the Madras Act does not notice any such distinctions), there appears to be only one case which has dealt with hot milk and that is *Harrington* v *Slater* (1). In that case, the appellant had asked the respondent to supply him with a glass of hot milk, which she did. The milk was deficient in fats. The Justices held that no offence was committed relying upon an earlier decision in *Lane* v. *Collins* (2) which was a case of skimmed milk It was contended for the respondent in the Court of Appeal that the milk had ceased to be milk in the commercial sense, that the appellant asked for hot milk and received hot milk and that hot milk need not comply with the Regulations. For the appellant it was argued that the respondent should have supplied to appellant with milk in its natural condition, but which had been made hot. The latter contention prevailed In the leading judgment, Earl of Reading, C. J raised the question whether when a purchaser asked for a glass of hot milk and was served with hot milk which had been adulterated, there had been a delivery to him by the seller of milk of the nature, substance and quality demanded. Referring to *Lane* v. *Collins* (2) he pointed out that since that decision, the Sale of Milk Regulations, 1901, had come into force which provided the requisite percentage of fat and milk-solids that should be found in merchantable milk. Darling, J. who was a party to this decision said:

"The Justices have decided that no offence has been committed on the ground that when the appellant asked for hot milk he was supplied with what he asked for, when in fact all the respondent supplied him with was milk which had ceased to be milk, owing to the deficiency of necessary constituents".

These observations forceibly apply to the

1. 90 L.J. K.B. 265
2. (1884) 14 Q.B.D. 193

present case and from the judgment of the Chief Justice it is clear that *Lane* v. *Collins* (2) upon which the Justices had relied was wrongly decided. I may point out that the decision in *Lane* v. *Collins* (2) which was given in 1885 was under the Sale of Food and Drugs Act of 1875 which has since been repealed. The Act now in force in England is the Sale of Food and Drugs Act of 1938. In s. 20 (1) of that Act milk is defined to mean milk intended for sale or sold for human consumption, or intended for manufacture into products for sale for human consumption. In section 100 (2) (a) of that Act, it is provided that any reference to milk shall be construed as including a reference to cream and separated milk but not as including a reference to dried milk or condensed milk. The standard quality of milk is prescribed under what are called the Sale of Milk Regulations. In *Harrington* v. *Slater* (1) reference was made to the Regulations of 1901 which were said to have superseded the decision in *Lane* v. *Collins* (2). Those Regulations have from time to time been changed and the Regulations now in force are the Sale of Milk Regulations of 1939 (printed at page 257 of Bell's Sale of Food and Drugs, 11th edition). The 1939 Regulations prescribe that a sample of milk must contain at least 3 per cent of milk-fat and 8·5 per cent of milk-solids which precisely corresponds to the percentages prescribed under the Madras Act with regard to cow's milk. The important point to be noted is that neither in the English Sale of Food and Drugs Act nor under the Sale of Milk Regulations nor under the Milk and Dairies Regulations 1926 to 1943 is it contemplated that hot milk should be treated as anything different from milk in the ordinary sense.

Hot milk is, thus both in the English law and under the Madras Act noting but milk in its natural condition which has been made hot and it should contain the prescribed minima of milk fact and milk solids. When it is found that on account of adulteration with water or abstraction, those percentages diminished and that the sample taken of the adulterated milk disclosed that in the place of 4·5 per cent there was only 1·5 per cent of milk fat, there can be no doubt that the person who sold the milk whether in raw state or as hot milk infringed the prohibition contained in section 5 (1) (d) of the Act read with rules 19, 20 and 27 and is punishable under rule 29-A as also under S. 5 (1) (d) of the Act. In my opinion, the Magistrate came to an erroneous conclusion as to the effect and scope of the material provisions of the Act and the Rules.

The appeal must be allowed and the acquittal of the respondent must be set aside. The respondent is convicted under S. 5 (1) (d) of the Madras Prevention of Adulteration Act, 1918, and rule 29-A of the Rules framed under that Act. With regard to the sentence, I have to take into account the fact that P.W. 3 who is a coffee hotel keeper deposed that what he wanted was boiled milk adulterated with water and was aware of the fact that he was purchasing such impure milk. Further the object of the Public Prosecutor in filing this appeal was mainly to obtain ruling of this Court as to the applicability of the Act to hot milk. In view of these considerations, the sentence need not be as severe in this case as ordinarily it has to be in such cases. I sentence the respondent to pay a fine of Rs. 15 in default to suffer Simple Imprisonment for one week.

N.T.R. — *Appeal Allowed.*

Referred Trial No. 51 of 1946 &
Criminal Appeals Nos. 234 & 235 of 1946
May 28, 1946

CHANDRASEKHARA AIYAR & KUPPUSWAMI AIYAR, JJ.

MARIAPPAN alias VENGAYAN & Another In re

Government of India Act, 1935, *S.* 205—*Withholding of certificate under.*

The High Court can grant a certificate under S 205 of the Government of India Act only in cases where a substantial question of law as to the interpretation of the Government of India Act or any Order in Council made thereunder is involved; in other cases a certificate cannot be issued. When nothing is said about a certificate it means that no such question as would warrant the grant of a certificate is involved. It is not necessary in each case to state in so many words that a certificate is withheld.

Trial referred by the Additional Sessions Judge of the Court of Session of the Coimbatore Division for confirmation of the sentences of death passed upon each of the said prisoners in case No. 17 of the Calendar for 1946 on 1—3—1946, and Appeals by the said prisoners accused 1 and 2 against the sentence of death passed upon them in the said case.

V. V Radhakrishnan & V. N. Jagannadha Rao, for Applts.

Public Prosecutor (*V. L. Ethiraj*) for Respt.

JUDGMENT

(CHANDRASEKHARA AIYAR, J.)

The learned Additional Sessions Judge of Coimbatore convicted the appellants, who

are accused 1 and 2, of the offence of murder of a girl called Kaliammal alias Papathi aged 9 years and sentenced them to death. The sentence comes up before us for confirmation. There are criminal Appeals filed by the two accused.

The girl Kaliammal alias Papathi was the daughter of P. W. 5 and P. W. 7. On the day of the occurrence, namely, 17—12—1945 she went to her mother's sundry shop in the chucklers' quarters near her village taking food for her and was on her way back to her house finishing her errand. She did not reach home that afternoon as usual. A search was made for her that evening but without any avail. Her dead body minus the jewels that she was wearing was discovered in a cholam field adjoining the path that she took to reach her village. On information received by the Police the 1st accused was arrested on 20—12—1945 and questioned. He then made a statement which led to the discovery of the jewels, M. O. No. 2 series, which the girl was wearing before she met with her fate. This statement was recorded by the circle Inspector of Police who was in charge of the investigation then and it was marked as Exhibit P-5. The 1st accused confessed having stabbed the girl to death and having removed the jewels and concealed them in the wall of a vacant house belonging to his aunt. He took the police and the witnesses to the house and produced the tin case in which the jewels were found.

The second accused made a statement before the Taluk Magistrate of Tirupur on 18-1-1945 in which he gave his version of the occurrence, the part that he played in it and the fact that the 1st accused after stabbing the girl to death took away the jewels, put them into a tin case and concealed it on the top of a mud wall. This statement was recorded by the Magistrate after the necessary warning, and though the 2nd accused has alleged that it was got from him as the result of compulsion, there is nothing to show that it was otherwise than voluntary. The only circumstances on which reliance has been placed for the 2nd accused to impugn the value to be attached to this statement is that it was recorded as late as the 18th of January and by a magistrate other than the magistrate to whom originally the requisition was sent according to the circle Inspector of Police who has been examined as P. W. 18. The original requisition is stated to be missing. It is urged that we should infer from the change of magistrates and the delay that has occurred that pressure was brought to bear upon the 2nd accused in the interval to make a confession corroborating what the 1st accused has said. There is no warrant, however, for any such inference being drawn, especially when it is remembered that the accused himself did not say before the lower Court that he was produced before the Palladam Sub-Magistrate and that he then refused to make any statement confessing his part in the crime and that thereafter he was kept in custody and coerced into submission by the police or by any other authorities.

What the 2nd accused has stated can be taken into account not only as against himself but also as against the 1st accused. Far from exculpating himself he has given a version which incriminates him completely in the murder of the girl. At the instance of the 1st accused he gagged the girl's mouth with a cloth and when life became extinct as a result of stabs inflicted by the 1st accused, he removed the jewels from the legs of the dead body.

As regards the 1st accused, it was urged that the statement made by him should not have been admitted in its entirety containing the confession that he stabbed the girl, because the jewels that were recovered as the result of the information given by him could not be said to have been so recovered on the strength of the statement that he murdered the girl but only on the basis of his admission that he removed the jewels from the person of the girl. Such truncation or dissection of a statement recorded by the police officer is not warranted according to the law as understood in this Court, whatever may be the view taken in some of the other High Courts about the interpretation to be placed on section 27 of the Indian Evidence Act. Exhibit P-5 was, in our opinion, properly admitted and there is no escape from the conclusion that the girl was murdered by accused 1 and 2 on the afternoon of 17-12-1945 for the sake of the jewels.

We place no reliance in this case on the evidence given by P.W. 10 even though the learned Sessions Judge appears to have thought something of it. The statement of the boy, that he saw the accused on the day in question with blood-stained hands and with a blood-stained knife, questioned them about the blood and got the unsatisfactory answer that they killed a rat, is worth practically nothing when it is remembered that he did not say anything about all this when the

police were investigating into this occurrence the previous day to his knowledge, he being present on the scene. When he was asked why he did not then tell them about what he had seen his answer was that he did not remember what he had witnessed.

There is no direct evidence in this case, but the confession of the 1st accused leading to the discovery of the jewels which the unfortunate girl was wearing on her person just before she was murdered and the statement made by the 2nd accused to the magistrate under section 164, Cr. P.C. make it perfectly clear that they are guilty of the offences with which they stand charged and were rightly convicted under section 302 I.P.C.

For the 2nd accused an argument was based on his age which is given as 16 years in Exhibit P-1, and as 20 years in the statements made before the lower Courts and it was urged that the lesser sentence would meet the ends of justice. Age by itself is not an extenuating circumstance and in a case of deliberate and pre-planned murder like this we do not feel justified in treating the case of the 2nd accused differently from the case of the 1st accused as regards sentence.

The sentences imposed by the lower Court are confirmed and the appeals are dismissed.

The learned Public Prosecutor asks us to say, apparently because he is instructed by the Government to make such a request that this is not a fit case for a certificate under s. 205 of the Government of India Act. S. 205 is in these tems:

> "An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves substantial question of law as to the interpretation of this Act or any order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly."

The High Court can grant a certificate only in cases where a substantial question of law as to the interpretation of the Government of India Act or any order in council made thereunder is involved; in other cases a certificate cannot be issued. The section casts on the High Court the duty to consider in every case, of its own motion, whether any such question is involved and to give or to withhold a certificate accordingly. When we say nothing about a certficate and do not grant it, it means that on the materials now before us, no such question as would warrant the grant of a certificate is involved. It is not necessary, in our opinion, in each case to state in so many words that we withhold a certificate. We are perfectly conscious of the duty imposed upon us by the statute and it is not necessary that we should remind ourselves or be reminded of it on each occasion and say something in express terms as to what is our intention with regard to the power conferred on us under section 205.

N.T.R. — *Appeal dismissed.*

Referred Trial No. 251 of 1945

Cr. Appls. Nos. 867 of 1945 and 37 of 1946

January 29, 1946

HORWILL & SHAHABUDDIN, JJ.

VALLI AMMAL
v.
EMPEROR

Evidence Act (I of 1872), S. 27—Statement admitting removal of jewels of dying person found murdered—Conviction for murder—Cr P. C. (V of 1898) Ss. 236, 237, 403 & 423 —Charge of murder — Conviction under S. 411, I. P. C.—Legality.

The medical evidence showed the deceased woman died of asphyxia due to throttling. Her jewels were missing. Statements were made by the accused leading to the recovery of the jewels. The admissible portion of the statement by accused 1 was to the effect that she took the jewels from the person of the deceased, that the deceased was not conscious but there was still life when the jewels were removed and that she gave some oj the jewels to the third accused. The third accused made a statement that she received some of the jewels of the deceased from the first accused. The third accused was originally charged also under S. 380, I.P.C. but on her conviction for murder the charge was withdrawn and she was acquitted.

Held: (1) *In view of the circumstance that the object of the murder was the taking of the jewels and in view of the statement of the first accused herself, she must be held to have been responsible for, or participated in, the murder.*

(2) *That the evidence only showed that the third accused knew that some offence had been committed but was not sufficient to hold that she participated in the murder.*

(3) *There was no legal bar to the third accused being convicted under S. 411, I.P.C. of being in possession of property which she knew had been stolen.*

I. L. R. 8 *Luck.* 518 *is not good in law in view of the Privy Council decision in I. L. R.* 6 *Lah.* 226

(4) *The acquittal of the third accused under s.* 380 *prevented her being convicted for an offence under s.* 411, *I.P.C.*

Trial referred by the Court of Session of the Tinnevelly Division for confirmation of the sentence of death passed upon the said Prisoner in case No. 109 of the Calendar for 1945 on 20—11—1945 and appeals by the appellants above-named (Accused Nos. 1 and 3) against the sentences of death and transportation for life passed upon them respectively in the said case.

V. V. Radhakrishnan & T. C. Raghvan for the accused.

Assistant Public Prosecutor, for Crown.

JUDGMENT

(HORWILL, J.)

The two appellants have been convicted by the learned Sessions Judge of Tinnevelly on a charge of murder.

There were three accused in the lower Court. The first was Valli Ammal, one of the appellants. She was sentenced to death. The other appellant was the third accused in the lower Court, who was sentenced to transportation for life. The second accused in the lower Court was acquitted.

The deceased person had been suffering for a long time from cancer of the uterus, of which disease, she was slowly dying. On account of this disease, there was a foul-smelling discharge from her uterus, which made her presence unbearable to her husband, P.W. 3 and to his second wife, P.W. 4 The result was that she was removed to a separate hut, where she was cared for by the first and second accused, a mother and daughter, and at times by the third accused a friend.

On the morning of Tuesday, the 14th of August last, the deceased was found lying dead with no marks of violence that were apparent to those who then saw her. Her jewels were however missing; and when the doctor found that she had met her death by throttling, suspicion at once fell on the three accused, who had been attending on her. The third accused was questioned first by the police and she made a confessional statement. This led to the other two women being questioned, who also gave confessions. The confession of the second accused was not admissible under section 27 of the Evidence Act, because it did not lead to the discovery of any material fact. That is the reason why the learned Judge acquitted her. The learned Judge however admitted a great part of the confessional statements of the first and third accused; and the portions admitted showed that they had participated in the murder. Upon reading through these confessional statements, we find that the learned Sessions Judge admitted more than was strictly necessary to discover the material fact that the jewels of the deceased woman were in the possession of the accused The portion of Exhibit E, the confessional statement of Valli Ammal, the first accused, which we consider to be admissible is this:—

"I removed the two pambadoms and two mudichus worn in the ears and the gold suthuru worn in the neck by Tharuvai Achi Chellathamma (deceased). We shared the jewels that night. I gave Meenakshi (third accused) the pair of pambadams taken from Tharuvai Achi. My daughter and myself took the remaining two gold mudichus and thali suthuru, taken from Tharuvai Achi. I have kept them in a pot in the store room of my house. I shall take out and produce the same".

The admissible portion of Exhibit C, the confessional statement of the third accused, is:—

"Valliammi (first accused) gave me the two pambadams removed from Tharuvai Achi's ears for my share. I tied them in a piece of cloth torn from my old saree and hid them in the roof of my house, I shall take out from the roof my house, where I have kept and produce the Pambadams of Tharuvai Achi given by Valliammal. By Tharuvai Achi I mean the deceased Chellathammal of the southern house".

When the first accused was questioned by the Committing Magistrate she admitted that she had been in possession of the jewels and that she had taken them from the person of the deceased. She said:—

"At about 9 a.m. on Tuesday mornin , I went as usual to the house of the deceased. I called her "amma, amma". She was not conscious. But there was life. At once I removed the jewels on her body and returned. I tied all the jewels so removed in one cloth and hid them in the roof of Meenakshi's house. These are the jewels—2 pambadams, 2 mudichus, and 1 Suthuru—that I removed. These were not divided and I did not tell Meenakshi 'this is your share', nor did I give her. It was I who took out this packet from the roof when questioned by the police. I gave this packet to the Sub-Inspector".

and later on she said:—

"This woman was in a dying condition. She was not conscious. I removed them, thinking that "if I remove and get away with the jewels now nobody will suspect me and later on they can be sold and the sale proceeds appropriated".

On these statements and on the evidence the learned advocate for the first accused argues that the prosecution has not proved that she murdered the deceased woman. He considers his arguments strengthened by the conduct of P. W. 3, the husband of the dec.

cased woman, and P.W. 4, the second wife of P.W. 3. P.W. 3 seeing the deceased woman lying dead without her jewels, and apparently fearing that suspicion would fall on him and his wife, gave a very foolish statement to the village magistrate, Exhibit B. In that statement P.W. 3 said:—

"I returned home from the fields this morning at about 10 a.m. for taking food. On coming home, my second wife Sudali Ammal (P. W. 4) informed me that when she went to give water to the said first wife, she (Chellathammal) was unable to speak, her hands were shivering and the jewels in her neck and ears were missing. On my going at once and seeing her, there was hard breathing. The jewels on the neck and the jewels in the ears were missing. I sat by her side. In about half an hour she died."

In court, P.W. 3 said that he had given this statement out of fear, that it was not true, and that when he arrived in the morning his wife was already dead. Had this question whether the deceased was alive in the morning when P.W. 3 returned from his fields depended upon the evidence of P.Ws. 3 and 4 alone, we would have had considerable doubt whether they were speaking the truth; but the matter seems to be concluded by the evidence of P.W. 1, the doctor who conducted the post-mortem examination. His evidence and his post-mortem certificate show that death was caused by asphyxia due to throttling. Many of the internal organs were congested, the hands and jaws clenched, and the neck was highly congested on both sides. There were also marks of finger nails on the throat. Since the deceased died of throttling, she could not have survived the throttling. In other words, she must have died while pressure was being applied to her neck or within a few minutes after the pressure was removed. The statements given by P.W. 3 to the village magistrate on the following morning could not therefore have been true.

Another witness, P.W. 5, was examined by the prosecution to prove that during the night, at about 10 p.m. accused 2 and 3 had been bathing, a circumstance so strange at that time of the night that it threw suspicion on these two accused. We find it difficult, however, to attach any particular significance to this fact; and the learned Sessions Judge did not do so.

To sum up, the evidence against the first accused is that she took the jewels from the person of the deceased—a circumstance in itself almost conclusive that she participated in the murder. Her statement in Court makes it clear that she removed the jewels from the deceased woman before she died or while she was dying. She said in the passage set out above that the deceased was not conscious, but that there was still life when she removed the jewels from her body. It is suggested that some other person, possibly P.W. 4 throttled the deceased and that during the few minutes that intervened between the throttling and death, the first accused might have entered the room where the deceased woman was lying and taken her jewels. In view of the undoubted circumstance that the object of the murder was the taking of the jewels and in view of the statement of the first accused herself and her confessional statement, we consider it to be certain beyond all reasonable doubt that the first accused was responsible for, or participated in the murder.

The evidence that the third accused participated in the murder is not conclusive; because both her statement and the statement of the first accused merely show that some of the jewels that were on the deceased person were given by the first accused to the third accused as her share. This would show that the third accused knew that some offence had been committed; but it is not clear evidence, we consider, that the third accused participated in the murder. She has therefore to be acquitted of that charge.

It however seems to us that the third accused was guilty under s. 411 of the Indian Penal Code of being in possession of property which she knew had been stolen from the person of the deceased. It has been argued on the authority of *Daulat Ram* v. *King Emperor* (1) that when a person is charged with murder, he cannot be convicted of an offence under one of the property sections. S. 237 read with s. 236 does not however suggest that any such limitation is placed on the Court. The appellant in C. A. No 37 of 1945 could undoubtedly have been charged under s. 411, in that her possession of the property was part of the evidence of her participation in the murder; and since she could have been charged under s. 411 she could, under s. 237, have been convicted under s. 411. In *Begu* v. *The King Emperor* (2), their Lordships of the Privy Council had to consider whether a person who was charged under s. 302 of the I.P.C. with murder could be convicted under section 201 of the I. P. C. of causing the disappearance of evidence. Their Lordships referred to

1. (1933) I.L.R. 8 Luck. 518
2. (1925) M.W.N 418: I.L.R. 6 Lah. 226 P.C.

sections 236 and 237 and held that in view of the wording of these sections they could entertain no doubt that the procedure adopted by the Court below, even though the accused was not specifically charged with that offence, was a proper procedure and one warranted by the Cr.P.C. The argument in *Doulat Ram* v. *King Emperor* (1) would apply equally to section 201 of the I P.C., and so must be deemed to enunciate bad law in the light of the later Privy Council decision. We have therefore no doubt that the third accused could be convicted under section 411 even though not charged under that section.

There is however a difficulty in the way of our convicting this appellant under sec. 411 I.P.C., even though S. 423 of the Cr.P.C., would in our opinion empower us to do so; and that is that the third accused was originally charged under section 380 I.P.C.—to which section 411 would be a minor charge—which charge was separated from the charge of murder. After the Sessions Judge convicted the third accused of murder he acquitted her of the charge under section 380, the charge being withdrawn by the Public Prosecutor. As the appellant has been acquitted of the charge under section 380, I.P.C., we feel that the doctrine of *autrefois acquit* prevents us from now convicting the accused of that or any lesser offence. Clearly, the appellant should not have been acquitted of this charge until the time for filing an appeal had expired.

Because of this difficulty in convicting the appellant under section 411 I.P.C., the learned Assistant Public Prosecutor has argued that the appellant is guilty under section 201 of the I.P.C., of concealing evidence of an offence either of murder or of robbery with the intention of screening either herself or the first accused. We feel very doubtful whether she can be said to be guilty under this section; because the third accused did not take the jewels to screen an offender, but to cause unlawful gain to herself. The learned Assistant Public Prosecutor has attempted to distinguish between mere possession of the jewels by this appellant and the concealing of the jewels by placing them in the roof. As, however, the third accused is very poor and probably does not possess a trunk or any other suitable receptacle for keeping jewellery, we are not at all sure that the roof, the place, from which the jewels were recovered, was not the natural place in which this appellant would have kept the jewels, even if she had obtained them honestly. We are not therefore satisfied that in placing the jewels where she did the appellant attempted to screen either herself or the first accused from any charge.

The only remaining question is with regard to the sentence to be imposed on the first accused. We feel that as she is a woman with a very young child, it would be better to impose the lesser sentence; so that the child will not be deprived of its natural guardian.

In the result, the appeal by the first accused is allowed to the extent of reducing her sentence to one of transportation for life. The appeal of the third accused is allowed *in toto*. Her conviction and sentence are set aside, and it is ordered that she be set at liberty.

N.T.R.

—

Criminal Revision Case No. 568 of 1945
(Criminal Revision Petition No. 527 of 1945)

March 25, 1946

KUPPUSWAMI AYYAR, J.

AMRITLAL N. SHAH
v.
V. NAGESWARA RAO

Cr.P.C. (V of 1898), S. 145—Dispossession by force—Continuance of threat of breach of the peace—What is.

It is not in all cases that actual force should be used before it could be said that the eviction is a forcible one. Misrepresentation and improper threats are sufficient to constitute forcible dispossession.

Where petitioner was in possession, and his servants were made to vacate the premises by the production of a notice by a magistrate obtained on misrepresentation, it must be considered that there was a forcible eviction of the petitioner.

Merely because the dispossessed party did not take the law into his own hands and there has been no violence, it could not be said that there can be no breach of the peace and the proceedings dropped. It is only if there has been a subsequent settlement, or the petitioner agreed to give up possession, that the proceedings can be dropped under S. 145 (5), *Cr. P. C.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate of Rajahmundry dated 2—3—1945 and made in M. C. No. 12 of 1944.

D. Suryaprakasa Rao, for Petr.

B. Jagannadha Das & T. P. Gopalakrishnan, for Respt.

ORDER

This is a petition to revise the order of the Additional First Class Magistrate of Rajahmundry in M. C. No. 12 of 1944 dropping further proceedings under S. 145 (5), Cr P C. The petitioner had taken on lease the Hanuman Picture Palace also called Amrit Talkies in Lakmivaropetta at Rajamundry from the respondent and another, and he was in possession of the same till 9—9—1944. The petitioner is a person who belonged to Bangalore and he had taken this building on lease for running cinema shows. The petitioner had taken a licence. Representing to the District Magistrate that under the terms of the lease the licence should be taken by him only in the name of the lessor, the lessor, the respondent, got the licence issued to himself, and a notice was also issued saying that the respondent was entitled to possession. The notice ran as if the District Magistrate had consulted the Government Pleader and had accepted his opinion. Accordingly, when the petitioner was absent his manager and others were sent out and the respondent went to the Talkies, got possession of the property and began to run the show. The petitioner got information from his manager and other servants and came to Rajahmundry and filed this petition. A preliminary order was issued by the Magistrate, saying that there was a dispute about possession of an apprehension of a breach of the peace. The respondent was directed to file a statement. Inquiries were also made. Documents were filed. The learned Magistrate found that the petitioner was in possession till 9th or 10th October 1944 when he was dispossessed; but he was of opinion that as there was no subsequent actual breach of the peace and as the parties were peaceful, no action need be taken and dropped the proceedings.

The Magistrate has found on the evidence that the petitioner was in possession, and it is also in evidence that the notice was issued on incorrect information. There is nothing in the lease to indicate that the petitioner was not to obtain the licence in his own name but should obtain it in the lessor's name. To that extent, the representation was wrong, and the Magistrate's notice was therefore based on incorrect information. This is not disputed before me. But what is urged before me is that the lease contained a clause of forfeiture for non-payment of rent. As a matter of fact, the lease was originally for one year, and there was a subsequent settlement under which a larger rent was payable, and the petitioner was paying it. It is also in evidence that there was a suit for the rent prior to these proceedings and there was no prayer in that suit for enforcing the forfeiture. From the records, it is clear that the petitioner was in possession till the date on which he was evicted, and it is true that they did not take up cudgels or use violence to resist the entry by the respondent. But there is no doubt that in the absence of the petitioner the manager and other servants had no other go, since the notice of the Magistrate was shown to them; and since it was a notice issued on a mistake, such an eviction should be considered to be an eviction by force. It is not in all cases that actual force should be used before it could be said that the eviction is a forcible one. Misrepresentation and improper threats besides these are sufficient to constitute forcible dispossession, and there were these in this case. It was by getting the licence cancelled and by getting it issued in the name of the lessor and by having the notice issued by the Magistrate that the servants and others were made to leave. Therefore it cannot be said that the preliminary order of the Magistrate saying that there was an apprehension of breach of the peace and that there was forcible dispossession was incorrect. As a matter of fact, the further proceedings clearly indicated this. But what happened is that the petitioner did not take the law into his own hands and enter on the property. If the contention of the respondent is to be accepted, it would mean that law-abiding citizens who are prepared to leave the matter to be decided by the Court instead of taking the law into their own hands are not to have the benefit of an order under section 145, if they are peaceful. This is not a case in which matters should have to be dropped by reason of sec. 145 (5). It is only if there has been a subsequent settlement or if the petitioner agreed to give up the lease holding it and not claim to get back possession of the property, action can be taken under section 145 (5). Merely because there has been no further violence, it could not be said that there cannot be a breach of the peace and proceedings should be dropped. As it was found that the petitioner was in possession and had been evicted only by notice obtained on incorrect representation to the Magistrate and only by the issue of a notice on such incorrect recitals

that the petitioner's servants have been made to vacate the building, it will have to be considered that there was a forcible eviction of a person entitled to be in possession.

As was pointed out in *Kamal Kutty* v. *Udayarama Razah Valia Raja of Chirokkal* (1) it is not necessary that the continuance of a breach of the peace is necessary before a final order could be passed. Vide also *Bai Jiba* v *Chandulal Ambalal (2)* and *Gurditta* v. *Taza* (3).

I accordingly set aside the order of the lower court and instead declare that the petitioner is entitled to be in possession, that he was in possession, that he was forcibly ousted by the respondent, that he is entitled to have his possession restored, and that he will be put in possession of the property which is the subject matter of these proceedings.

N.T.R. —— *Petition allowed.*

Criminal Revision Case No. 331 of 1946.

(Criminal Revision Petition No. 320 of 1946.)

August 23, 1946.

YAHYA ALI, J.

P. SRINIVASA RAO IN RE

Presidency Towns Insolvency Act (III of 1969), S. 103 (b) (ii)—Failure to notify to Official Assignee terms of his employment—When offence.

There is no positive duty cast upon the insolvent to notify to the Official Assignee the fact of his having entered into a contract of service and the terms of remuneration. Where the insolvent has not been called upon by the Official Assignee to furnish particulars hereof, the insolvent cannot be convicted under S. 103 (b) (ii) Presidency Towns Insolvency Act of having concealed part of his property with a fraudulent intention. When an allocation has been made the excess over the allocation in the personal earnings of the insolvent belongs to him and he has an unfettered right of disposal over it, unless it is a case where the Official Assignee considers that there is a considerable wide margin which can be taken over for distribution, in which case he has to move the Insolvency Court and obtain its orders.

Petition under Sessions 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the judgment of the Chief Presidency Magistrate, Egmore, Madras dated 26—3—1946 and passed in C. C. No. 3209 of 1945.

T. M. Kasturi, for Petr.

Crown Prosecutor, for Crown.

1. (1912) M.W.N. 1154; I.L R. 36 Mad. 275
2. (1926) A.I.R. Bom. 91
3. (1936) A.I.R. Lah. 108

ORDER

This case can be disposed of on two short grounds. The petitioner has been convicted under section 103 (b) (ii) of the Presidency Towns Insolvency Act and sentenced to simple imprisonment for two months. That section enacts that any person adjudged insolvent who with fraudulent intent to diminish the sum to be divided amongst his creditors has concealed any part of his property of what kind so ever shall be punishable with imprisonment for a term which may extend to two years. The petitioner was adjudged insolvent in 1932 He was then running a school called the Sri Ram Motor School. An allocation of Rs. 10 was fixed to be paid by him to the official Assignee and it is admitted that he has been regularly paying the allocation. The Sri Ram Motor School was sold away with its goodwill by the petitioner and the proceeds of its sale were duly handed over by him to the Official Assignee. The petitioner appears to be a skilled technician. He seems to have devised a good gas plant and obtained a patent therefor. He handed over the patent also to the Official Assignee. He started a business of manufacturing producer gas plants in partnership with one Cowasji Patel. Subsequently that business was taken over by P.W. 3. P.W. 3 in his evidence admits that he was and still continues to be, the proprietor of that business and the petitioner was only a servant under him. The basis upon which the learned Chief Presidency Magistrate has proceeded, namely, that he was partner, is therefore incorrect. The terms of remuneration under the service contract were that the petitioner should be paid Rs. 150 per mensem and fifty per cent of the net profits It is not necessary to make a distinction between the two and call one salary and the other a partner's share in the profits as it is clear from the evidence of P.W.3 that the entire amount payable by him was salary though the mode of payment was fixed in the shape or a monthly cash payment and a profit percentage. It would appear that during the material period large sums of money amounting to some Rs. 11,000 were paid to or drawn by the petitioner. The account Exhibit E has been produced in proof of that statement. Mr. Kasthuri tried to argue that the genuineness of Exhibit E was not established: but that contention is not open to him in view of the testimony of D. W. 2 who was put in by the

petitioner himself. He has definitely proved Exhibit E and the relevant entries on pages 401 to 404. But this does not help the prosecution very much. There are several entries there which show that the amounts were drawn for purposes connected with the business. Although a large number of entries are shown as paid in cash and they aggregate as pointed out by the learned Magistrate to about Rs. 7,000, it is not clear from the evidence as to how much of that actually represents payment made to the petitioner towards his remuneration and how much of it was payment for the expenses of the business. The only inference in the circumstances can be one in favour of the petitioner, namely, that the petitioner did not draw anything over and above the sanctioned scale of remuneration. The question then is whether having drawn remuneration according to the contract scale it was the duty of the petitioner to bring to the notice of the Official Assignee the fact that he was getting under this contract from P. W. 3 the sum of Rs. 150 per mensem and the share in the profits of the business. I have been taken through the various provisions in the Presidency Towns Insolvency Act and looking at Ss. 24 and 33 which lay down the duties that are attributed to an insolvent, it is nowhere laid down that the insolvent should in such circumstances report to the Official Assignee the remuneration that he was getting from his new employer. It was argued by the learned Crown Prosecutor adverting to sections 17 and 52 of the Act that the after-acquired income over and above what is required for the maintenance of the insolvent and his family becomes property within the meaning of these sections and that it vests in the Official Assignee. There is no dispute about that proposition. But the principle is well settled that although property belonging to the insolvent at the commencement of the insolvency vests in the Official Assignee forthwith, after-acquired properties do not vest in him unless he chooses to intervene. When an allocation has been made it cannot be disputed that the excess over that allocation in the personal earnings of the insolvent belongs to him and he has an unfettered right of disposal over it unless it is a case where the Official Assignee considers that there is a considerably wide margin which can be taken over for distribution amongst the creditors, in which case he has to move the Insolvency Court and obtain its orders. Such a thing has been done in this case.

The petitioner has been convicted for having 'concealed' part of his property with a fraudulent intention. As I have pointed out, there is no positive duty cast upon him under the statute to notify to the Official Assignee the fact of his having entered into this contract of service and the terms of remuneration. He was not called upon by the Official Assignee to furnish details or particulars as to the amounts that he received in connection with this business. To constitute concealment within the meaning of section 103 (b) (ii) there must be some act on the part of the petitioner whereby he can be shown to have wilfully kept some property away from the notice or view of the Official Assignee. If there was a duty on his part to disclose or if there was a call on him to disclose and he did not conform to it or gave incorrect particulars, that would be a case of concealment within the meaning of the rule. In the present case I find it difficult to hold that there has been any such concealment on the part of the petitioner and it is not therefore necessary to consider the further ingredients of the offence as to whether the requisite fraudulent intent was present. In this view the conviction of the petitioner cannot be upheld. The petition is allowed and the conviction is set aside.

N.T.R. —— *Appeal allowed.*

Cr. R. C. Nos. 145 and 146 of 1946
Cr. R. P. 139 and 140 of 1946
July 23, 1946
YAHYA ALI J.

THE EXECUTIVE OFFICER PANCHAYAT BOARD, TADEPALLIGUDEM
v.
BONDAPALLI AYODHYARAMAYYA

Local Boards Act (Madras Act XIV of 1920). *S.* 193 *& Sch. VII—Boiling paddy and storing paddy—Licence.*

Boiling of paddy or storing of paddy are not specifically mentioned in Schedule VII to the Local Boards Act and therefore boiling of paddy or storing of paddy without licence do not constitute offences under Section 193 *punishable under section* 207.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of acquittal dated 28—9—1945, in C. C. Nos. 613 and 614 of 1945 on the file of the Court of the Stationary Sub-Magistrate of Tadepalligudem.

B. V. Subramanyam for Petr.
S. Ramamurthi for Respt.

ORDER

These two cases can be dealt with together as they raise a common point. In one case the respondent-accused was charged by the Executive Officer, Panchayat Board, Tadepalligudem, who is the petitioner here, with having without a licence boiled paddy. In the other case he was charged with having stored paddy without a licence. The prosecution case was that for both these processes it was necessary for the accused to obtain licences under Sec. 193 read with Schedule VII of the Madras Local Boards Act. The learned Magistrate in acquitting the accused has pointed out that neither of these items is specifically mentioned in Schedule VII and that therefore boiling of paddy or storing of paddy did not constitute offences under Sec. 193 and could not be made punishable under Sec. 207. He also considered the question whether they could come under the residuary item (q) of Sch. VII which speaks of a person generally "doing in the course of any industrial process anything which is likely to be offensive or dangerous to human life or health or property". It has been pointed out by the Magistrate that there is no evidence to show that either of these processes was likely to be offensive or dangerous to human life or public health. My attention has not been drawn to any other provision under which storage or boiling of paddy has been made an offence punishable under the Madras Local Boards Act. I see therefore no reason to interfere with the order made by the learned Magistrate.

The petitions are dismissed.

N.T.R. — *Petition dismissed.*

Criminal Revision Case No. 401 of 1946
(Case Referred No. 13 of 1946)

July 26, 1946

YAHYA ALI, J.

EMPEROR
v.
SRI JAMI VEERABHADRASWAMY

Local Boards Act (XIV of 1920), S. 227-A—Panchayat president misappropriating war fund collections—Sanction.

Previous sanction under S. 227-A, Local Boards Act is not necessary for the prosecution of the president of a panchayat board for criminal breach of trust in respect of moneys collected as subscriptions to the war fund.

Case referred for the orders of the High Court, under Section 438 of the Criminal Procedure Code by the Additional District Magistrate of Vizagapatam in his letter dated 30th March 1946.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

This is a reference by the Additional District Magistrate of Vizagapatam made under Section 438(1) of the Code of Criminal Procedure in the following circumstances.

The president of the Panchayat Board, Narasannapeta, was charged by the Police for having committed criminal breach of trust in respect of certain moneys collected as subscriptions to the War Fund from the employees of the Panchayat Board and from contractors. A preliminary objection was taken on behalf of the accused to the maintainability of the prosecution on the ground that there was no sanction by the Provincial Government as required under Section 197 of the Code of Criminal Procedure. The Additional First Class Magistrate, Chicacole, to whom the case had been transferred from the file of the sub-divisional Magistrate, Chicacole, where it was first filed, made an order ruling that the question whether the alleged criminal breach of trust was committed while discharging the official duties as such could only be gone into after evidence was recorded. It is against this order that the Additional District Magistrate has submitted this reference and his view is that the provisions of section 227-A of the Madras Local Boards Act would stand in the way of the prosecution in the absence of the previous sanction of the Provincial Government. It is pointed out by him that the alleged acts were committed by the accused when he disbursed the salaries of the employees and when he paid the contractors *quo* President of the Panchayat Board. Although powers of removal of the Presidents of Panchayat Boards have been delegated to the Inspector of Municipal Councils and Local Boards, the specific power of sanctioning prosecutions vested in the Provincial Government under section 227-A has been reserved under section 233 of the Madras Local Boards Act for the Provincial Government. So far the learned Additional District Magistrate's view is correct; but even under section 227-A it is necessary that the act attributed to the

president should have been done or purported to have been done in the discharge of an official duty. The collection of subscriptions for the war fund cannot be deemed to be an official duty which had to be performed by the President of a Panchayat Board as such and it cannot be held that, after the war fund subscriptions had been collected—presumably by consent of the respective subscribers—and subsequently misappropriated, the misappropriation was while acting or purporting to act in the discharge of his official duty. In any view of the matter it is clear that section 227-A of the Local Boards Act is not applicable to the facts of this case.

It follows, therefore, that the previous sanction of the Provincial Government is not necessary for the prosecution of the President of the Panchayat Board, Narasannapeta in the case under reference.

The reference is rejected and the records are returned.

N.T.R. ——

Criminal Revision Cases Nos, 91, 92 & 93 of 1946

(Criminal Revision Petitions Nos. 88, 89 & 90 of 1946.)

July 30, 1946

YAHYA ALI, J.

THE EXECUTIVE OFFICER, PANCHAYAT BOARD, TADEPALLIGUDAM

v.

BANDAPALLI AYODHYARAMAYYA

Local Boards Act (XIV of 1920), S. 193—Owner or occupier—Liability to take out licence.

Where there is an occupier who is responsible for doing the act or process which requires a licence, there is no obligation on the owner to apply for and obtain a licence under S. 193 of the Local Boards Act.

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of acquittal dated 24—9—1945 in C.C. Nos. 610, 611 and 629 of 1945 on the file of the Court of the Stationary Sub-Magistrate of Tadepalligudam.

B. V. Subramanyan, for Petr.

S. Ramamurthi, for Respt.

ORDER

These three cases raise the question whether the burning of bricks by an "occupier" in a place belonging to an owner entails on the owner the liability under section 193 of the Madras Local Boards Act to apply for and obtain a licence, and whether in the absence of such application by the owner, he is guilty of an offence under section 207 read with section 193 of that Act. It is admitted that the accused himself did not burn the bricks but that D. W. 2 did so as an occupier. The learned Magistrate who tried the case acquitted the accused on two grounds. The first is that there is no evidence that the accused himself burnt the bricks, and the second is that the burning of the bricks in this case was admittedly not in carrying out a trade but was for the private purpose of the occupier D. W. 2. He pointed out that in Schedule VIII the description of the offence under Section 193 is in the words "Using a place for an offensive or dangerous trade without a licence". There is no evidence on record to show that the burning of bricks in these cases amounted to "an offensive or dangerous trade". It is not necessary to go into the second question. But w th regard to the first, I am disposed to agree with the contention advanced on behalf of the respondent that where there is no occupier the obligation to apply for and obtain a licence under section 193 of the Madras Local Boards Act is on the owner, but where there is an occupier who was responsible for doing the act or process which required a iicence, it was for him to make the application and in either case it is the particular delinquent that should be charged under the provisions of section 207 read with section 193. It is significant that in sub-section (2) of section 193, it is mentioned that the "*owner or occupier* of every such place" shall apply to the executive officer of the panchayat for a licence. It is not enacted that both the owner and the occupier should do so. It is for the authority to make enquiries as to who actually used the place for any of the specified purposes and to proceed against such person. Since in this case it is admitted that the accused did not use the place for burning bricks but that D. W. 2 did so, I am of opinion that the Magistrate was right in acquitting the respondent in all these three cases.

The petitions are dismissed.

N.T.R. —— *Petitions dismissed.*

Cr. R. C. Nos. 805 and 806 of 1946
(Cr. R. P. Nos. 773 and 774 of 1946.)

September 19, 1946

YAHYA ALI, J.

ABDUL RAHIM & Others
v.
EMPEROR

Gaming Act (Madras Act III of 1930), Section 4 (2)—Betting on horse race in public street—Offence.

Though under section 4 (2) of the Gaming Act there is no reference to public street, in view of the definition of gaming in section 3, betting on a race horse anywhere outside the race enclosure, whether in a public street or in any other place, is an offence within section (4) (2). The fact that a particular horse which was backed did not actually run or was not scheduled to run would make no difference.

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the judgments of the Court of the Sub Divisional I Class Magistrate of Saidapet in C. A. No. 11 and 10 of 1946 respectively (C. C. No. Nos 5563 and 4564 of 1945. and 4557 to 4560 of 1945 on the file of the Stationary Sub Magistrate of Saidapet.)

M. C. Rajagopalan for Petitioners.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

Two technical objections are raised against the convictions of the petitioners in these two cases, which are dealt with together as the questions arising in them are common. The first is that, under section 4 (2) of the Madras Gaming Act there is no reference to public street as in section 12, and it is from that circumstance argued that gaming in a public street is not offence under the Gaming Act. Gaming is defined in section 3 as including betting on a horse race except when such betting takes place in a place within the race enclosure. That amounts to saying that betting taking place anywhere outside the race enclosure whether in a public street or in any other place is an offence within the meaning of section 4 (2) of the Madras Gaming Act, 1930. The second objection is that some of the horses which were backed by the petitioners did not actually run on that day and were not even scheduled to run. I am of opinion that this would not make any difference so far as the liability under the Act is concerned. What is prohibited is wagering or betting on a horse race. The fact that a particular horse which was backed did not actually run or was not scheduled to run would make no difference. The underlying purpose and policy of the Madras Gaming Act is to save the ordinary race-going public from the evil effects of betting on horses which did not actually run in the race or on horses which were not scheduled to run on the particular date would not amount to an offence.

Both the objections fail and the petitions are dismissed.

N.T.R. —— *Petitions dismissed*

Criminal Revision Case No. 219 of 1946
Criminal Revision Petition No. 212 of 1946

July 18, 1946.

YAHYA ALI J.

PETETI KONDALA RAO
v.
EMPEROR

Defence of India Rules, 1939, Rule 121—Conviction under.

Where the charge against an accused person does not refer to rule 121 of the Defence of India Rules, a conviction of the accused cannot be based on that rule.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of the Guntur Division dated 21—11—1945 and made in C. A. No. 147 of 1945 (C. C. No. 10 of 1945 Joint Magistrate, Ongole).

K. Krishnamurthi, for the Petr.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

The petitioner who was the first accused in the lower Court has been convicted of the offence of contravening the provisions of the Drugs Control Order, 1943. He is alleged to have sold a bottle of Adexelin to P. W. 2 for Rs. 2—12—0 while the control price of the drug was Rs. 2—6—0. The conviction by the trying magistrate was under section 9 (a) of the Drugs Control Order read with Rule 81 (4) of the Defence of India Rules. Section 9 (a) of the Drugs Control Order refers only to wholesale or retail dealers and not to their servants or clerks. Rule 81 of the Defence of India Rules does not carry the matter further. This rule was amended on 17—7—1945 so as to bring within the operation of section 9 of the Drugs Control Order, servants agents etc. But the fact remains that until 17th July 1945 persons other than wholesale or retail dealers were not within the purview of the Drugs Control Order. The learned Sessions Judge who heard the appeal against the conviction held that the

case fell within the purview of Rule 121 of the Defence of India Rules which runs thus:

"Any person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, a contravention of, any of the provisions of these Rules or of any order made thereunder, shall be deemed to have contravened that provision or, as the case may be, that order."

It is to be noted that the trying magistrate himself did not invoke the aid of Rule 121 of the Defence of India Rules. Nor did he base his conviction on that provision. The charge against the accused does not refer to Rule 121 of the Defence of India Rules and hence the conviction based on that rule obviously cannot stand. In this view it is not necessary to go into the merits of the case although a long argument on the merits was addressed by Mr. Krishnamoorthy, the learned advocate for the petitioner, and if a finding were necessary, I should have had no difficulty in agreeing with the concurrent findings of the Courts below that the first accused sold the drug for a price higher than the control price. The conviction and sentence for the reason mentioned above must however be set aside. The petition is allowed and the fine if paid shall be remitted.

N.T.R. —— *Petition allowed.*

Criminal Revision Case No. 357 of 1946
(Criminal Revision Petition No. 345 of 1946)

August 22, 1946

YAHYA ALI, J.

RAMASWAMI & Another
v.
EMPEROR

Penal Code (XLV of 1860), *S.* 411—*Recovery of property from house—Inference of possession.*

The mere recovery of property from the house in which the two accused lived is not sufficient by itself to atribute guilty knowledge to either of them, unless there were some-other circumstances connecting them with the possession of the property.

Petition under Section 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the conviction and sentence of fine passed by the Sub Divisional Magistrate of Palghat in C. A. No. 45 of 1945 dated 31—12—1945 (C. C. No. 702 of 1945 S. S. Magistrate's Court, Palghat.)

T. C. Raghavan for Petrs

Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

The conviction of the petitioners rests entirely on the evidence of the seizure of one bale of piece goods from the house in which they were living. It would appear that the seal of a railway wagon was found broken and tampered with on 4—7—1945 and when the contents were verified two bags of areca nuts and a bale of piece goods were missing. So far as the areca nuts are concerned both the Courts below have absolved the petitioners and it is not necessary to go into that part of the case. The piece goods bale is said to have been recovered from the petitioners' house on 7—7—1945 and it is alleged that the seizure was made on information given by the first accused. The evidence relating to the seizure of the articles is somewhat thin. It consists of the evidence of the Head Constable P. W. 10 and P. W. 10's case is that he arrested the petitioners on the railway platform and on information obtained from them he went to the house of the petitioners and found there the bale of piece goods (M. O. 2 series) and seized the same. When P. W. 10 examined the accused it was easy for him to secure the presence of the station-masters. He could also have taken them along with him when he went to the house of the petitioners, but he did neither of these things. On the other hand, he did it all on his own and it is only when the seizure was made and he produced the petitioners along with the piece goods bale on the platform that the two station-masters P. Ws. 5 and 6 were called in to attest the Mahazar that was then prepared. This procedure does not appear to be perfectly regular or at all events satisfactory. Apart from this aspect of the matter, there is one other important consideration. It is not clear from the evidence whether the petitioners 1 and 2 who are admittedly brothers were undivided or whether in that house where the alleged stolen property was discovered there were present persons other than the two petitioners. The mere recovery of certain property from the house in which the two petitioners lived is not sufficient by itself to attribute guilty knowledge to either of them unless there were some other circumstances connecting them with the possession of the property. There is no such circumstance in this case except the alleged statement or information given to the Head Constable. There is really no evidence with regard to that. All that the Head constable says is that he proceeded to the house of the petitioners on information. What that information was is not disclosed. The Mahazar itself is clearly not admissible in evidence, because it was prepared after the property was found in the house and was

produced by the Head constable along with the petitioners at the platfrom. The mere fact of such production in those circumstances shows nothing and does not establish any connection of either of the petitioners with the possession of the stolen properties. This is thus a case where there is hardly any legal evidence against the petitioners on which a conviction under section 411, I.P.C. could be based. Giving them the benefit of this finding the application is allowed and the convictions and sentences are set aside. The fine, if paid, will be refunded.

N.T.R. — *Conviction set aside*

(Cr. R. C. No. 667 of 1946)
Cr. R. P. No. 64 of 1946
March 27, 1946

KUPPUSWAMI AYYAR, J.

P. SWAMINATHA PILLAI
v.
S. RAGHAVACHARIAR & Others

Criminal Procedure Code (V of 1898), Section 145—Preliminary order—Omission to mention apprehension of breach of the peace—Effect.

Failure to mention in the preliminary order in a proceeding under S. 145 Cr.P.C., that a breach of the peace was likely to be caused is an irregularity, but it is not fatal where there were materials before the Magistrate, materials furnished by the petition itself, to indicate that a breach of the peace was likely. Omission to make mention of these materials in the order itself is not fatal to the proceeding.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional 1st Class Magistrate of Kumbakonam dated 31—10—45 and made in M. C. No. 25 of 1945.

T. S. Venkatarama Ayyar, for Petr.

T. M. Kasturi & T. R. Subramaniam, for Respts.

Assistant Public Prosecutor (*A. S. Sivakaminathan*) for Crown.

ORDER

This is a petition to revise the order of the Additional First Class Magistrate, Kumbakonam, in proceedings under Section 145 Cr.P C. declaring that the counter petitioners (the B. Party) were in possession of the disputed lands and that the petitioner (the A. Party) was not in possession thereof, and directing the lands to be put in possession of the B. Party.

These lands are nanja lands in Tiruppalathurai village. They are said to belong to one S. Aravamuda Ayyangar of Hyderabad. The first counter-petitioner is his agent. The petitioner claims to have been in possession of these lands till April 1945 as his tenant This is not disputed. On 7-5-1945 a notice was given by the first counter petitioner the agent of the owner, to the petitioner asking him to vacate, alleging that he was in arrears of rent. To that notice a reply was sent by the petitioner on 19-5-1945 denying that he was in arrears and claiming occupancy rights in the lands. On 24-5-1945 the first counter petitioner, the agent leased the lands to counter petitioners 3 and 4 and they are said to have ploughed the lands and raised seedling thereon. The petitioner then made a complaint to the police on 15-6-45 that the counter-petitioners 3 and 4 had interfered with his possession and were creating trouble. The Sub-Inspector inspected the locality and found the counter-petitioners ploughing, and he asked counter-petitioners 3 and 4 not to interfere with the lands and plough them. Thereupon a petition under section 144, Cr.P.C. was filed before the Sub-Magistrate by the first counter petitioner who had leased the land to counter-petitioners 3 and 4 and the Magistrate passed a preliminary order on 28-6-45. On 5-7-45 the petitioner appealed against that order to the Sub-Divisional Magistrate and for that order being rescinded. On 14-7-1945 that order under section 144(1) was rescinded, and on that very day proceedings were started under section 145 by the Sub-Divisional Magistrate. The properties in dispute were attached, a receiver was appointed and the properties were put in possession of the Receiver. The enquiry under section 145 went on and the Magistrate came to the conclusion that the Counter petitioners before him (the B party) were in possession of the properties on 14-7-1945 and directed the properties to be put in their possession.

Two points are urged before me in revision, The first is that the order under section 144 Cr.P.C. which was rescinded and proceedings under Section 145 Cr.P.C. were started did not contain any statement that there was a dispute about the properties which is likely to cause a breach of the peace; and the other is that the lower Court had no judisdiction to appoint a receiver and direct possession of the properties to him.

As to the first point, it is true that the preliminary order does not specifically mention that a breach of the peace was likely to be caused, but then, the Magistrate has

started these proceedings under section 145 Cr.P.C. on the very day he rescinded the order under section 144. The Magistrate was in possession of all the material facts to indicate that there was a dispute about possession and a breach of the peace was apprehended. It is also significant that, even in the petition filed by the petitioner before him it was stated that there was likely to be a breach of the peace as he was threatened with dispossession with resort to force. It cannot therefore be said that the Magistrate had no materials before him to be satisfied that there was likely to be a breach of the peace and action would have to be taken. The petitioner before me was aware of these facts. Further he did not take any steps till now to have the proceedings started under section 145 Cr.P.C. quashed.

This is no doubt an irregularity in the procedure; but I do not think it is fatal because there were materials before the Magistrate, materials furnished by the petitioner himself, to indicate that a breach of the peace was likely. Omission to make mention of these materials in the order itself is not fatal to the proceedings. I do not think this is a ground for interfering in revision.

With regard to the second point urged regarding the appointment of a receiver and directing delivery of possession of the properties to him, I do not think it is necessary to consider this point now that the Receiver has ceased to be a receiver and no useful purpose will be served by considering the point whether he has been properly in possession of the properties or not.

The petition accordingly fails and is dismissed.

N.T.R. —— *Petition dismissed*

Cr. Miscellaneous Petition No. 998 of 1946

September 4, 1946

YAHYA ALI, J.

BOMMAREDDI SATYANARAYANA REDDI
v.
EMPEROR

Cr. P. C. (*V of* 1898), *S.* 227—*Addition to charge.*

A complaint charged the accused with offences under Ss. 323, 325 *and* 355 *I. P. C. After hearing evidence adduced for the complainant the Magistrate framed a charge only under S.* 323; *but subsequently he added the charges under Ss.* 325 *and* 355.

Held *the Magistrate had jurisdiction to add the new charges at the later stage.*

Petition praying that in the circumstances statep therein the High Court will be pleased to quash the Additional charges framed by the Stationary Sub-Magistrate of Bezwada Taluk on 14—6—1946 in C. C. No. 9 of 1946 on his file.

G. Gopalaswami, for the Petitioner.

Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

ORDER

This is an application to quash two additional charges framed by the Sub-Magistrate of Bezwada against the petitioner who is the accused in C C. No. 9 of 1946 on the file of that court. The case started on a private complaint in which the petitioner was charged with having committed offences under sections 323, 325 and 355 I. P. C. After hearing evidence adduced for the complaint, the Magistrate framed a charge only under section 323, but subsequently he added the charges under sections 325 and 355 and it is with reference to these additional charges that this application is filed.

The contention of the learned advocate for the petitioner is that the act of the Magistrate in framing a charge only under section 323 when the complaint alleged three specific offences, amounted to a discharge of the petitioner under sections 325 and 355, and after that discharge was made the Magistrate had no jurisdiction to frame the additional charges. He contends that that would amount to a reviewing of the order of discharge which the Magistrate was not competent to do. The machinery provided under the Code of moving higher authorities to set aside the order of discharge it is urged should have been availed of by the complainant if he felt aggrieved. The learned Public Prosecutor points out that even assuming for argument's sake that the framing of the charge at the earlier stage under section 323 alone amounted to an implied discharge under sections 325 and 355 I.P.C., it has been held in a number of cases in this Court that that would not preclude a fresh complaint being made in respect of those offences. In *Emperor* v. *Chinnakaliappa Goundan* (1), and in *In re Ponnuswami Goundan* (2), two Full Bench cases of this Court, it was held that in such circumstance the filing of a fresh complaint is not prohibited, and that such would be the case even where the order of dismissal of the complaint had not been set aside. Further it has to be pointed out that section 227 Cr. P. C. em-

1. (1906) I.L.R. 29 Mad. 126
2. (1931) M.W.N. 1149: Cr. 237: 55 Mad. 622

powers the court at any time before judgment is pronounced to alter or add to any charge. Necessary safeguards are provided in section 228 to avoid any prejudice being caused to the accused by reason of the alteration or addition. The learned advocate for the petitioner argues that expression "add to" in section 227 means the addition of a few words to the existing charge and not the addition of a new charge. I cannot accept this argumet. If what was intended was to empower the Court only to make some corrections for addition to the existing charge, the word "alter" occurring in the section would have met the requirements and it was not necessary to enact the words "add to". Redundance cannot be attributed to the legislature and it is clear from the sections that follow section 227 that what the legislature intended was that the Court may add a new charge at any time before judgment is pronounced provided that the safeguards mentioned in section 228 was duly observed. It may be pointed out that in section 229 and section 230 of the Code reference is made to a "new charge" in addition to an altered or an added charge. This clearly shows that in section 227 in the words "added to" the concept of a new charge is implicit. I find no force in the contention of the learned advocate for the petitioner that the Magistrate had no jurisdiction to add these new charges at a later stage after once he had framed only one charge under section 323 I.P.C.

The petition is dismissed.

N.T.R. —— *Petition dismissed.*

Criminal Revision Case No. 934 of 1945.
(Criminal Revision Petition No. 874 of 1945)
January 24, 1946.

KUPPUSWAMI AYYAR, J.

R. MANICKA MUDALIAR
v.
EMPEROR

Madras Traffic Rules, R. 8 (*b*)—*Overtaking a 'vehicle'—Vehicle means a moving vehicle.*

In Rule 8 (*b*) *of the Madras Traffic Rules, which says that when any person is in the vicinity of a bend or cornor or hill or other obstruction which impedes his view ahead he should not overtake a vehicle, by 'vehicle' is meant a vehicle that is moving and not a vehicle that is parked.*

Petition under sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the order of the Court of the Joint Magistrate of Coonoor dated 12—6—1945 and made in S. C. No. 139 of 1945.

K. V. Ramaseshan, for Petr.

The Public Prosecutor (*V. L. Ethiraj*), on behalf of the Crown.

ORDER

The petitioner has been convicted for an offence punishable under rule 8 of the Madras Traffic Rules. He was a driver of a motor bus that was coming on the date of the offence from Ootacamund towards Coonoor. The offence is said to have taken place just below where the Ootacamund Coonoor road branches off towards the barracks at Wellington. A military lorry was parked on the eastern side of the road just near a bend in that road. Every motor vehicle that had to pass through that portion of the road had necessarily to overtake that parked lorry. On the date of occurrence, P. W. 1, a motor cyclist was coming towards Ootacamund from Coonoor and he is said to have run into the motor bus that was coming from the north and was driven by the petitioner. The prosecution case is that there was contravention of rule 8 of the Madras Traffic Rules by the accused inasmuch as he overtook the lorry that was standing. As stated already, the lorry was parked on the eastern side of the road The evidence of the motor cyclist was to the effect that he came round the corner and found the bus in the act of passing the parked military lorry. If he was therefore able to see the bus overtaking the military lorry, then the bus must have come near the military lorry much earlier than the time when the driver could have noticed the motor vehicle coming up. If that be so, there was nothing wrong in his having overtaken the military lorry There was nothing in view to indicate that he could have apprehended causing any inconvenience or danger for other traffic, before he overtook the lorry. Therefore no offence could be said to have been committed by the petitioner by any contravening of rule 8 clause (a).

Now let us see if there was any contravention of rule 8 (b). It says that when any person is in the vicinity of a bend or corner or hill or other obstruction which impedes his view ahead he should not overtake a vehicle. In this evidently by "vehicle" was meant a vehicle that is moving and not a vehicle that is parked. If you take it as including a parked vehicle, then it would mean that whenever there is a vehicle parked in a road near a bend, there should be no traffic near that portion of the road. It is clear that there was this collision between

the motor cycle and the bus only after the bus had overtaken the parked lorry.

This is a case therefore in which the road was blocked by a parked lorry and we will have to consider whether in the portion which was not blocked there was any contravention of the tarffic rules. I am not able to see any contravention.

It is clear from the evidence of D.W. 1 that the motor cyclist was coming up the hill at a fast speed. D.W 1 put it at 50 miles per hour, but the Magistrate himself concedes that he must have been travelling fast. If, therefore, it is a case of a vehicle that was coming fast near a bend, then it cannot be said that a motor bus driver was wrong in having overtaken the lorry near the bend when he had not seen any obstruction or any inconvenience or danger by this overtaking This is therefore a case in which the driver of the bus is entitled to the benefit of the doubt and giving him the benefit of the doubt, I set aside the conviction and sentence and acquit him.

N.T.R. —— *Conviction set aside*

Criminal Revision Case Nos. 88 & 89 of 1946
(Cr. P. C. Nos. 85 & 86 of 1946)

September 19, 1946.

SRI LIONEL LEACH, C.J. & LAKSHMANA RAO, J.

NAGALINGAM
v.
EMPEROR

Defence of India Act (XXXV of 1939), *S.* 2 (1) *&* (2) (3) *& R.* 121—*Rule*, 121, *if* ultra vires.

The wide powers of sub-section (1) *of section* 2 *of the Defence of India Act are not restricted by sub-sections* (2) *or* (3).

R. 121 *of the Defence of India Rules in within the powers conferred by S.* 2 (1).

The fact that sub-section (3) *of S.* 2 *does not contain any reference to preparation does not affect the validity of R.* 121 *making the preparation for the commission of an offence an offence.*

Petitions under Sections 435 and 439 of the Code ofCriminal Procedure 1898, praying the High Court to revise the judgment dated of the Court of Session of the Madura Division dated 29—10—1945 and passed in C. A. No. 213 and 214 of 1945 preferred against the judgment of the Court of the City 1st Class Magistrate of Madura dated 19—9—19:5 and passed in C. C. No. 49 of 1945.

N. Somasundaram & P. Rajamanickam, for Petrs.

Advocate General (*K.Rajah Iyer*) *& The Asst. Public Prosecutor* (*A. S. Sivakaminathan*), for Crown.

ORDER
(SIR LIONEL LEACH, C. J.)

These two petitions may be dealt with together. The petitioner in Criminal Revision Case No. 88 of 1946 is the husband of the petitioner in Criminal Revision Case No. 89 of 1946. They were convicted by the City First Class Magistrate of Madura of having committed an offence under Rule 90-B (2) read with Rule 121 of the Defence of India Rules and each was fined Rs. 1,000. They appealed to the Sessions Judge of Madura, who by an order dated the 29th October 1945 dismissed their appeals. This Court is asked to set aside the convictions under its revisional powers because it is said the rules under which the accused were convicted are *ultra vires* the Central Government.

The accused are residents of Jafna. In the month of December 1944 they visited Madura where during that month and the month of January 1945 they purchased gold which they had made into small cylindrical blocks. The case against them was that they had bought the gold and had it made into ingots in preparation for export to Ceylon, an offence under Rule 90-B (2). The facts are not in dispute. The only question which the Court is called upon to decide is whether the rules referred to are within the rule making power of the Central Government.

Rule 90-B (2) states that no person shall, except with the permission of the Reserve Bank of India or of a person authorized in this behalf by the Bank, take or send out of British India money in excess of such amount as may be specified by the Bank or any gold. Rule 121 provides that a person who attempts to contravene or abets or attempts to abet, or does any act preparatory to a contravention of any of the provisions of the Defence of India Rules or of any order made thereunder, shall be deemed ro have contravened that provision or, as the case may be, that order. Rule 90-B (3) provides the punishment which may be inflicted for the wrongful export of money or gold.

The case for the accused is based on the wording of section 2 (3) of the Defence of India Act. Sub-section (1) of that section says that the Central Government may by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community. Sub-section (2) says that without prejudice to the generality of the powers

conferred by sub-sec. (1), the rules may provide for, or may empower any authority to make orders providing for all or any of the matters enumerated in the sub-section. Sub-section (3) says that the rules made under sub-section (1) may make further provisions which are specified. Sub-section (3) (ii) reads as follows :—

"The rules made under sub-section (1) may further provide that any contravention of, or any attempt to contravene, and any abetment of, or attempt to abet, the contravention of any of the provisions of the rules or any order issued under any such provision, shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both."

The learned Counsel for the accused says that as this clause does not make the preparation for the commission of an offence an offence, the Central Government had no power to include in Rule 121 the statement that a person who does an act preparatory to the contravention of the rules shall be deemed to have contravened the rules. If sub-section (3) of section 2 of the Act stood alone, there might be force in this argument; but sub-section (3) does not detract from the very wide powers given to the Central Government by sub-section (1). As we have already pointed out, the provisions of sub-section (2) are without prejudice to the generality of the powers conferred by sub-sec. (1) and sub-section (3) says that the rules "may further provide."

In *King Emperor* v. *Sibnath Banerji* (1) the Privy Council said :

"The function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1) and the rules which are referred to in the opening sentence of sub-section (2) are the rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as, indeed, is expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-section (1).'"

If sub-section (2) is not restrictive of the powers, sub-section (3) cannot be. In the clearest terms the Judicial Committee has stated that the wide powers of sub-section (1) are not restricted by what follows.

Rule 121 is a rule made under section 2 (1) of the Act and is within the powers conferred upon the Central Government by that clause. The accused were preparing to contravene the Act. The fact that sub-section 3 of S. 2 does not contain any reference to preparation does not affect the validity of Rule 121. The case was rightly decided by the Courts below and the petitions must be dismissed.

N.T.R. — *Petition dismissed.*

Criminal Revision Case No. 74 of 1946
(Crl. Revision Petn. No. 71 of 1946)
April 17, 1946

KUPPUSWAMI AYYAR, J.

POLISETTI GOVINDA RAO OF ELLORE
v.
EMPEROR

Factories Act (XXV of 1934), S. 63—Liability under.

In the absence of evidence to show that the accused was present and obstructed, the accused person cannot be convicted under section 63, Factories Act, for having obstructed an inspector of factories from entering the factory premises. He cannot be convicted by invoking section 71 either, because section 63 indicates that there must be wilful obstruction.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Ellore dated 11—9—1945 and passed in C. C. No. 57 of 1945.

T. Ramamurthi for Petr.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

This is a case in which the manager of a factory has been convicted and sentenced to pay a fine of Rs. 50 for having obstructed the Additional Inspector of Factories from entering the factory premises. My attention is not drawn to any evidence to indicate that the petitioner himself obstructed or that he asked any others to obstruct. No claim can be made under section 71 of the Indian Factories Act throwing the burden on the petitioner to show that any other person obstructed, because section 63 clearly indicates that there must be a wilful obstruction. If it was wilful obstruction then the petitioner himself must have been present and obstructed. Since there is no evidence to show that he obstructed, the petitioner has to be acquitted. The conviction and sentence are accordingly set aside and the petitioner is acquitted.

N.T.R. — *Conviction set aside.*

1. (1945) M.W.N. 546 ; Cr. 94, F C.

Criminal Appeal No. 356 of 1946

October 10, 1946

YAHYA ALI, J.

J. S. Mathews

v.

Emperor.

Defence of India Rules, 1939, R. 122—Liability under—Charge.

The appellant who is manager of the show-room of Messrs Spencer & Company Ltd., was convicted under R. 81 (4), Defence of India Rules read with Cl. 11, Drugs Control Order.

The charge did not state that the offence was committed by Messrs Spencer & Co., and that the accused was being charged as the manager of the company under the Drugs Control Order; nor was rule 122 Defence of India Rules referred to in the charge

Held *that the charge should at least have indicated that the person who contravened the provisions of the rules was the company or the body corporate and that the accused was being held liable in respect of that act in his capacity as the manager of the company. But the error might be held to have been cured by S. 537 Cr. P. C., as there had not been any serious prejudice to the accused and the trial proceeded in all its stages as if it was directed against the company itself and the accused was not in any manner handicapped in his defence by reason of this defective charge.*

Appeal against the judgment of the Court of the Chief Presidency Magistrate, Egmore, Madras dated 28—3—1946 and passed in Case No. 267 of the Calendar for 1946.

V. K. John, for Applt.

Crown Prosecutor, for Crown.

JUDGMENT

The appellant who is manager of the show-rooms of Messrs. Spencer & Company, Ltd., Madras, has been convicted by the Chief Presidency Magistrate under rule 81 (4) of the Defence of India Rules read with clause 11 of the Drugs Control Order, 1943, and has been sentenced to a fine of Rs. 5000, and in default to two months' rigorous imprisonment.

The case against the appellant in brief is thus: On the 10th October 1945 a tin of Glaxo was needed for a sick girl named Rajam aged one year. P.W. 2 who was a neighbour was approached by the girl's father. P.W. 2 made enquiries in the market, but as he was not able to get it and on learning that there were stocks at Messrs. Spencer & Co. he approached a medical practitioner, Dr. A. Narasinga Rao (P.W. 1) and obtained from him a medical certificate, Ex. P-1. Ex. P-1 merely states, without mentioning the name of the parent of the child or even the fact that it was required for a child, that Glaxo and Glucose-D were essential as diet for P.W. 1's patient. It was not mentioned in that certificate that the patient was a child one year old. P.W. 2 who is a clerk in the Office of the Special Assistant Commercial Tax Officer went with P. W. 3, the Special Assistant Commercial Tax Officer himself to Messrs. Spencer & Co. at about 3 p. m. P. W. 3 remained outside while P.W. 2 went in and met the accused. The accused is admittedly a European who is employed in Messrs Spencer & Co. and is not a salesman at the counter but is occupying a higher position as manager of the show-rooms. Presumably he is not conversant with Tamil except knowing a few simple words. P.W. 2 says that he showed the medical certificate, Ex. P-1, to the accused and asked him for a tin of Glaxo. Accordihg to P.W. 2, the accused asked him merely whether the certificate was addressed to Messrs. Spencer & Co. and on his reply in the negative the accused told him in Tamil "No. Go." P. W. 2 admittedly spoke to the accused in Tamil although he knew English fairly well, being a clerk in a public office. Immediately after obtaining the negative reply from the accused, P. W. 2 went to P. W. 3 who was stationed just outside, and both of them returned to the accused, and P. W. 3 questioned the accused why he had refused to sell the tin of Glaxo to P.W. 2. P.W. 3 disclosed to him his official capacity, and thereupon the accused informed him forthwith that he had refused to sell for two reasons, namely that the age of the patient was not given in Ex.P-1 and the certificate was not addressed to Spencer & Co. The third reason which the accused gives that he did not understand the Tamil words which were spoken by P. W. 2 were not according to P. W. 3 given out to him then. Immediately after this statement P. W. 3 checked the stock of Glaxo in the shop and found that there was substantial stock available. He also examined P. W. 2 and the accused recorded their statements, Exs. P-2 and P-3. In his statement, Ex.P-3, the accused gave out that after seeing the doctor's certificate produced by P. W. 2 he refused to supply because the age of the patient was not given therein and the certificate was not addressed to Messrs. Spencer & Co. Upon these facts,

the accused was prosecuted under clause 11 of the Drugs Control Order read with Rule 81 (4) of the Defence of India Rules.

Learned Counsel for the appellant has raised a preliminary objection of a technical nature. He contends that the charge is defective and that in consequence of the error in the charge he has been substantially prejudiced. The charge does not state that the offence was committed by Messrs. Spencer & Co. and that the accused being the Manager of the Company was being charged as such under the Drugs Control Order.

Clause 4 of the Drugs Control Order provides that no person shall carry on the business of a retailer at any place in British India except under and in accordance with the conditions of a valid licence. Under clause 7 the licensing authority may specify in the licence the conditions subject to which it is issued and the licensee is bound to comply with those conditions. Clause 11 provides that no retailer shall refuse to sell any drug without reasonable cause. In clause 11, there are 4 categories of persons mentioned, namely, manufacturer, importer, wholesaler and retailer and Messrs. Spencer & Co., are, for the purpose of this case, retailers. The accused in his individual capacity does not fall under any of these categories. He could, therefore, be only prosecuted as the manager of the retailer company by invoking the aid of rule 122 of the Defence of India Rules. Under that rule, if the person contravening any of the provisions of the rule is a company or other body corporate, its manager shall be deemed to be guilty of such contravention unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Rule 122 has not been expressly referred to in the charge. Although express reference is not necessary, the charge should at least have indicated that the porson who contravened the provisions of the rules was the company or the body corporate and that the accused was being held liable in respect of that act in his capacity as manager of the company. In the preamble, in describing the accused, the designation of manager of Spencer & Co., is no doubt used. But in the body of the charge, there are no words to indicate that it was the company that was being charged through its manager the accused with reference to the principle of liability enacted in Rule 122 of the Defence of India Rules. It is urged for the defence that this defect in the charge has caused material prejudice to the appellant. I am not satisfied. however, that on that account there has been any serious prejudice caused, since as far as I am able to see, the prosecution proceeded in all its stages as if it was directed against the company itself and the accused was not in any manner handicapped in his defence by reason of this defective charge. The error might be held to have been cured by section 532 Criminal Procedure Code.

Coming to the merits of the case, the principal fact to be noticed is that nobody interested in the child has appeared in the picture. The chief if not the only persons who have played any part in this affair are persons connected with the Commercial Tax Department. The conduct of P. W. 2 was remarkable. He is a Clerk and from the ability to speak English that he demonstrated subsequently, it is clear that when he first went to the accused and asked in Tamil for a tin of Glaxo he was doing it with a set purpose. He produced a doctor's certificate and according to him the accused did not even look at it. He has repeated this statement more than once, first in his examination-in-chief and later in his further cross-examination. On the contrary, P. W. 3 who went into the shop immediately with P. W. 2 stated that when P. W. 2 came back after getting a refusal from the accused he told him that the accused had seen the medical certificate and had still refused to sell. The conduct of P. W. 2 in talking to the accused in Tamil and in slipping out immediately after the accused used the words, "No go", to bring P.W. 3 in order to make a search of the stock and the incorrect statement that he has made as regards the inspection by the accused of the certificate — these circumstances very clearly indicate that P.W. 2's evidence is not worthy of credit. P.W. 3 played a relatively minor part. He was told by P.W. 2 that there was a refusal by the accused and he went in. As soon as he went in, the accused told him that since the age of the patient was not given in the certificate and since the certificate was not addressed to Messrs. Spencer & Co he had refused to sell. This is the consistent position which the appellant had adopted throughout and having regard to the provisions of the licence which the company was bound scrupulously to follow, it cannot be said that the attitude of refusal on the part of the appellant was unjustified. As pointed out, under clause 7 of the Drugs

Control Order, the licensee is bound to comply with the conditions of the licence issued to him. The licence itself is Ex. D-1. In paragraph 2 of the licence, it is specifically mentioned with reference to Glaxo that its retail sale should be regulated by registering the applications and distributing only to registered applicants. The direction is that only 10 percent of the total supply should be reserved for emergency demands to be issued to those who produce medical certificates. Lastly, it is provided in the licence that Glaxo should be sold only to those who have children below 18 months of age and who use it. It was imperative, therefore, for the company and its officers to satisfy themselves before issuing even a single tin that the person who was to use it was a child below 18 months of age. In the present case, there was absolutely nothing before the appellant, at the time when he is said to have refused to sell, to show that it was required for a child below 18 months of age. The natural conduct on the part of a person who was in sore need of a tin of Glaxo for a sick child would have been to question the person who had refused to sell why he did so and if he was told that there was no mention in the certificate about the age of the child he would have immediately furnished to the company satisfactory evidence about the age of the child. But apparently the object of P. W. 3 was not to secure a tin of Glaxo but to lay a trap and it is for that purpose that he had P. W. 3 at his elbow and the promptitude with which P. W. 2 ran out as soon as the accused used the words "No. Go." and P.W.1 come in and the search was made shows that the entire transaction was mala fide and prearranged.

It must be noted before concluding that the most important aspect of the matter, namely, whether the age of the child was disclosed to the appellant before the tin of Glaxo was asked for, was not considered by the learned Chief Presidency Magistrate although the point was definitely raised before him and it has so happened that this appeal has turned wholly upon that question. In the view I have taken on this matter, it is not necessary to examine the other reasons that have been given by the accused for refusing to supply the tin. From any point of view, I am unable to agree with the conclusion of the Chief Presidency Magistrate that the refusal in this case by the appellant to sell to P. W. 2 a tin of Glaxo on 10—10—1945 was without reasonable cause.

The appeal is allowed and the conviction and sentence are set aside; the fine if paid shall be refunded.

N.T.R. — *ppeal allowed.*

Criminal Revision Case No. 279 of 1946

Criminal Revision Petition No. 272 of 1946

November 1, 1946

YAHYA ALI, J.

MAYALAVAHANAM & OTHERS v. EMPEROR

Evidence Act (I of 1872), S. 25—Statements made to Assistant Inspector of Customs—Admissibility.

An Assistant Inspector of Customs is not a Police Officer for the purpose of S. 25, Evidence Act and statements given by accused persons before the Assistant Inspector of Customs are not hit by S. 25.

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the judgment of the Court of Sessions East Tanjore Division at Negapatam dated 6—3—1946 and passed in Criminal Appeal No. 3 of 1948 (C.C. No. 181 of 1945 on the file of the Court of the Additional I class Magistrate af Negapatam).

V. Rajagopalachari & K. N. Srinivasan, for Petrs.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The seven petitioners were convicted by the Additional First Class Magistrate of Negapatam under Rule 84 (3) read with rule 121 of the Defence of India Rules, punishable under Rule 84 (6) of the same Rules. On appeal the Sessions Judge of East Tanjore at Negapatam confirmed with convictions but reduced the sentences. The case against the accused was that they transported rice by sea from British India to Ceylon which is prohibited under a notification issued under Rule 84 (3) of the Defence of India Rules. The learned Sessions Judge has set out the facts with care in his exhaustive judgment. The conviction depends exclusively upon the statements made by each of the petitioners to the Assistant Inspector of Customs who proved them as P. W. 1. The main contention throughout on behalf of the accused has been that these statements are not admissible in evidence being repugnant to the provisions of section 25 of the Indian Evidence Act. Under that section, no confession made to a police officer can be proved as against a person accused of any offence. It is the petitioners' contention that since the Assistant Inspector of Customs is invested under the Sea Customs Act with certain powers of search, arrest and seizure he should be deem-

ed to be a police officer for the purpose of section 25. In support of this proposition he relies on two decisions of the Calcutta and the Bombay High Courts and on a decision of a Bench of this Court in *Someshwar H. Shelat In re* [1]. The Calcutta decision was that of a Full Bench in *Ameen Sharif* v. *Emperor* [2] and the Bombay case is *Nanoo Sheik Ahmed* v. *Emperor* [3]. That is also a decision of a Full Bench. Both these cases related to excise officers and it was held therein that an excise officer is a police officer within the meaning of Section 25 of the Indian Evidence Act. In this Court, however the contrary view has been uniformly taken upon the language employed in the Madras Excise Act as contradistinguished from the language in the Bengal Excise Act and Bombay Excise Act. The Bengal Excise Act makes the excise officers for the purpose of Section 25 police officers, and it is upon this provision contained in the Bengal Excise Act that the Calcutta Full Bench rested its conclusions. The Bombay Excise Act also is similar to the Bengal Excise Act. In the Madras Excise Act however there are no provisions which confer the same amount of powers on the excise officers in this Presidency as in the Bombay and Calcutta Excise Acts. It is for this reason that this Court has in a number of decisions held the view that upon the contruction of the Madras Excise Act Excise officers in this Province cannot be deemed to be police officers within the meaning of section 25 of the Indian Evidence Act. The decisions are *Mahalakshmaya* v. *Emperor* [4], and *Doraiswami Nadar* v. *Emperor* [5] decided by Sundaram Chetty J. and Bardswell J. sitting separately. The last decision was by Horwill J. in *Public Prosecutor* v. *Marimuthu Goundan* [6]. In that case the learned Judge on a scrutiny of the relevant provisions of the Madras Excise Act observed :—

"It appears to me that as section 25 (Evidence Act) refers only to a police officer the court should not extend it to other classes of officers merely on grounds of similarity of function especially in view of the fact that the Evidence Act was introduced at a time when the methods of the police were much more open to attack than they are now"

It will be noticed that all these cases are concerned with excise officers, but the decision of a Bench of this Court *In re Someshar H. Shelat* (1) on which Mr. Rajagopalachari relied on behalf of the petitioners, was one in which the position of officers of the Commercial Tax Department fell to be considered *vis-a-vis* the provisions of the Hoarding and Profiteering Prevention Ordinance. In that Ordinance sub-section (3) of Section 12 is in these terms:

"The Controller-General and surh Inspectors and other officers as may be empowered by the Central or the Provincial Government in this behalf shall, within the respective areas for which they are appointed, have power to investigate all offences punishable under this Ordinance, and in conducting any such investigation shall, within the said areas, have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure 1898 (Act V of 1898) when investigating a cognizable offence within the limits of his station."

Relying exclusively upon the phraseology employed in that sub-section the Bench held as under :

"That he (the Commercial Tax Officer) is a police officer within the meaning of the Section we have no doubt whatever. Section 12 (3) of the Hoarding and Profiteering Prevention Ordinance expressly gives him all the powers, duties, and privileges of an officer in charge of a police station under the Code Criminal Procedure, 1898, when investigating a cognizable offence within the limits of his station. Therefore he has the full status of a police officer and his powers and duties must be limited to those of a police officer under the Code of Criminal Procedure which means that he has no right in an investigation under the Ordinance to require a person to sign a statement and where such a statement is reduced to writing, it can only be used in accordance with the provisions of Section 162 of the Code of Criminal Procedure or section 27 of the Evidence Act."

It is thus clear that the concerned officer was deemed to be a police officer for the purpose of section 162 of the Criminal Procedure Code, because in the Ordinance itself it was specifically mentioned that in conducting investigations the particular officer shall have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Criminal Procedure Code. The question whether such statements are confessions made to a police officer within the meaning of section 25 of the Evidence Act did not arise there for consideration. The defence counsel draws attention to sections 169, 171, 173 and 176 of the Sea Customs Act under which certain powers of search, stopping vessels and searching for goods, arresting persons reasonably suspected, arresting persons escaping, seizing things liable to confiscation, have been conferred on the Customs Officers, but it will be

1. [1946] M.W.N. 271; Cr. 47
2. [1934] 61 Cal. 607 F.B.
3. [1927] A.I.R. Bom. 4 F.B.
4. [1932] M.W.N. 453 : Cr. 69.
5. [1934] M.W.N. 394 : Cr. 67.
6. [1938] M.W.N. 95 : Cr. 23.

seen that language analogous to that employed in Section 12 (3) of the Hoarding and Profiteering Prevention Ordinance is not found in the Sea Customs Act, nor even language similar to the language employed in the Bengal Excise Act or in the Bombay Excise Act. In fact this court has taken the view as would appear from Horwill J's decision cited above that the provisions of section 25 should not be extended to other classes of officers merely on the ground of similarity of function. I agree with the learned Sessions Judge that the statements given by the petitioners in Exhibit C series before the Assistant Inspector of Customs, P. W. 1 are not hit at by section 25 of the Evidence Act.

It is conceded that if these statements are admissible in evidence the guilt of the petitioners is established beyond question. The conviction of all the petitioners must therefore be confirmed. The only question that remains is one of sentence. It is pointed out that all the petitioners were boatmen in the employ of a person in Ceylon. They have been in remand for thirty-four days and they had obviously been used by others as mere instruments. The sentences of Rigorous Imprisonment awarded to accused 1. 3, 4 and 6 are reduced to the periods already undergone. The sentences of fine against all of them will stand.

N.T.R. ——

Criminal Revision Case No. 835 of 1946
(Criminal Revision No. 822 of 1946)
November 18. 1946
YAHYA ALI, J.

ANNAN NARASIMHA AYYAR
v.
RANGANTHAYAMMAL

Cr.P.C. (V of 1898), S. 488 (4)—Separate living—Right to maintenance.

By mere separate living it cannot be said that the married status between the husband and the wife comes to an end.

Sub-section (4) of S. 488; Cr. P. C. provides that the wife will not be entitled to maintenance if the parties have been living separately by mutual consent. Mutual consent involves the consent of both parties and if any one of them decides to put a stop to separate living,, sub-section (4) ceases to operate.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the court of the Additional I class Magistrate of Salem dated 29—6—1946 and passed in M.C. No. 9 of 1946.

D. Ramaswami Ayyangar & S. Kuppuswami, for Petr.

O. K. Ramalingam, for Respt.

ORDER.

This matter arises out of maintenance proceedings under Section 488 of the Criminal Procedure Code. The husband is the petitioner amd he seeks to set aside the order of maintenance made against him to pay the respondent, his wife, a monthly allowance of Rs. 15 as from 29th June 1946. The main contention raised on behalf of the petitioner is that himself and the respondent have been living by mutual consent separately for a period of seventeen years. The respondent says that the period is only twelve years. It is not necessary to resolve the difference as by mere separate living it cannot be said that the married status between the husband and the wife has come to an end. Sub-section 4 of section 488 provides that the wife will not be entitled to maintenance if the parties have been living separately by mutual consent. Mutual consent involves the consent of both parties and if any one of them decides to put a stop to separate living sub-section 4 ceases to operate. Then the wife gets her right to claim maintenance subject to such defences as the husband may have under section 488. There are no such defences raised here. I agree with the court below that the respondent is entitled to maintenance from the petitioner. As regards the quantum there are several factors which have to be taken into account in favour of the petitioner. On account of the long separate living of the respondent the petitioner has re-married and has some children through his second wife. He has made commitments and after so many years a sudden drain of this kind upon his slender resources would simply crush him. It is said by the respondent that he has four looms but the Magistrate actually finds that he has two looms and he has no immovable property or any other sources of income. So far as the respondent is concerned she has been so long maintained by her relations. It would appear that she herself has been earning at least Rs. 7 per month. Taking all these matters into consideration the amount awarded by the lower Court of Rs. 15 appears to be on the high side. It is reduced to Rs. 7-8-0 per month from 29th June 1946.

N.T.R. ——

Criminal Revision Case. No. 952 of 1949.
(Taken up No. 4 of 1946)
November 1, 1946
YAHYA ALI J.

VELLAI MUDALI IN RE.

Penal Code (XLV of 1860), S. 496—Tying tali by force-Offence.

While P.W. 2 was returning from her father's house at about 6 p.m. the accused who had intended to marry her but was rejected, seized her, pushed her down and tied a tali round her neck and let her go. The lower court convicted him under S. 496.

Held, *that the act of the accused in tying the tali round the neck of P.W. 2 in those circumstances did not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married within the meaning of S. 496 Penal Code.*

Case taken up by the High Court on perusal of the Calendar and Judgment in Sessions Case No. 37 of 1946 on the file of the Assistant Sessions Judge of the Court of Sessions, Coimbatore Division.

Public Prosecutor (V.L. Ethiraj) for Crown.

Accused, not represented.

ORDER.

This case was taken up by this Court on a perusal of the Calender and notice was given to the Public Prosecutor and the accused. The accused is not represented.

The accused was convicted by the Assistant Sessions Judge of Coimbatore uuder Section 496 of the Indian Penal Code for dishonestly or fraudulently going through the ceremony of being married, without lawful marriage, and was sentenced to rigorous imprisonment for one year. The case against him was that on 31st January 1946 at about 6 P.M. when the girl, P. W. 2, was returning from her father's house with a headload of fuel the accused seized her, pushed her down and tied a *tali* round her neck and then let her go. He had intended to marry her but he was rejected and she was about to be married to somebody else. He committed the act apparently to spite the girl and her parents. The facts were not seriously questioned by the accused but the question to be considered is whether even on the showing of the prosecution an offence has been made out under section 496 of the Code. I am definitely of of the opinion that the act of the accused in tying the *tali* round the neck of P. W. 2 in those circumstances does not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married, within the meaning of section 496 of the Code. The accused must be presumed to have known full well that according to the custom of the community that act did not constitute a ceremony of being married and there is no point in holding that by doing so he went through such a ceremony knowing that he is not thereby lawfully married. The conviction cannot be sustained and is therefore set aside. The accused is directed to be set at liberty.

N.T.R.

Criminal Appeal No. 853 of 1945
February 8, 1946
KUPPUSWMI AYYAR, J.

THE PUBLIC PROSECUTOR
v
D. KHADER KHAN

General Sales Tax Act (1939) S. 15 (b)—General Sales Tax Rules—R. 10—Prosecution for failure to pay tax—Proof of liability.

In a prosecution for failure to pay the general sales tax, the burden is upon the prosecution, where the accused disputes his liability to pay it, to establish affirmativly that the accused was liable to pay the tax and that he failed to pay the same.

(1936) M.W N. 1337 : 221, applied.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Joint Magistrate of Madanapalle in C.C. No. 86 of 1942 on his file.

Public Prosecutor (V. L. Ethiraj) for Crown.

Respondent not represented.

JUDGMENT

This is an appeal bs the Crown against the order of the Joint Magistrate of Madanapalle, acquitting the accused in C.C. No. 86 of 1945, who was prosecuted for failure to pay the general sales tax for 1943-44 and 1944-45 in contravention of Rule 10 of the General Sales Tax Rules. The offence was punishable under section 15 (b) of the Madras General Sales Tax Act, 1939.

There is no other evidence except that of the Assistant Commercial Tax officer to show that the accused was liable to pay the tax. Because he did not appeal against the levying of the tax, the prosecution wanted it to be inferred that the tax was leviable and that he was liable to pay the tax. As pointed out in *Ramaswami Iyengar* v. *The Sivakasi Municipality* [1], in which reference is also made to other cases decided by this Court, the burden is upon the prosecution to establish affirmatively that the accused was liable to pay the tax and that he failed to pay the same. It is admitted that he failed to pay it, but he

1. [1936] M.W.N. 1337; Cr. 221.

disputes his libility to pay it. He says that his turnover was very poor, that he did not have so much sales as it was thought he had and that therefore he was not liable to pay the tax. The prosecution must prove that the accused is liable to pay the tax claimed and it is not denied that, if that be so, the order must stand. Since I agree with the Joint Magistrate that the prosecution has to prove that the accused is liable to pay the tax claimed and that it has not proved it satisfactorily, the Magistrate was justified in acquitting the accused.

The petition is accordingly dismissed.

N.T.R. —— *Petition dismissed.*

Crimimal Revision Case No. 1173 of 1945.
(Criminal Revision Petition No. 1089 of 1945).
July 19, 1946
YAHYA ALI J.

NARRA PADMAVATHAMMA
v.
EMPEROR

Cr. P.C. (V of 1898), S. 133—Preliminary Order—Notice.

Sufficient opportunity should be given to the party to show cause against the confirmation of a preliminary order under S. 133, Cr.P.C.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the order of the court of the Joint Magistrate of Chandragiri dated 37—9—1945 and made in M.C. No. 50 of 1945,

M.V. Nagaramayya, for Petitioner,
Public Prosecutor, (V.L. Ethiraj) for Crown.

ORDER.

This application is to revise an order made by the Joint Magistrate of Chandragiri making absolute a preliminary order under section 133 of the Code of Criminal Procedure.

I am satisfied that sufficient opportunity was not given to the petitioner to show cause against the confirmation of the preliminary order. She is a lady who observes purdah and the notice itself had been served on her agent who promptly applied for time on the ground that the notice was too short. In spite of it the application for time was refused and the preliminary order was made absolute. In a matter like this it is essentail that the party aggrieved should have sufficient opportunity to meet the charge.

The order in M.C. No. 50 of 1945 dated 27—9—1945 is set aside and the Joint Magistrate is directed to issue a fresh notice to the petitioner giving her sufficient time and opportunity to meet the case. All proceedings which have been issued on the footing of the order which has been now set aside will stand vacated.

N.T.R. ——

THE END

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